No. 98-942-CFH Title: William Fiore, Petitioner
v.
Gregory White, Warden, et al.

Docketed: December 9, 1998 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Dec 9 1998	Petition for writ of certiorari filed. (Response due January 8, 1999)
	Dec 18 1998	Waiver of right of respondents Gregory White, et al. to respond filed.
	Dec 30 1998	DISTRIBUTED. January 15, 1999
	Jan 11 1999	Response requested.
	Feb 8 1999	Brief of respondents Gregory White, Warden, et al. in opposition filed.
	Feb 24 1999	REDISTRIBUTED. March 19, 1999
	Mar 22 1999	REDISTRIBUTED. March 26, 1999
	Mar 29 1999	Petition GRANTED. limited to questions 1 and 3 presented by the petition.
		SET FOR ARGUMENT October 12, 1999.
		**********
	May 11 1999	Brief of petitioner William Fiore filed.
	May 11 1999	Joint appendix filed.
	May 11 1999	Joint appendix in two volumes.
	May 13 1999	Brief amicus curiae of National Associational of Criminal Defense Lawyers filed.
	May 17 1999	Order extending time to file appellees' brief on the merits to and including Friday, June 25, 1999.
	Jun 25 1999	Brief amici curiae of Alabama, et al. filed.
	Jun 25 1999	Brief of respondents Gregory White, Warden, et al. filed.
	Jul 27 1999	Reply brief of petitioner William Fiore filed.
	Aug 13 1999	Record filed.
	Aug 17 1999	Record filed.
	Aug 26 1999	CIRCULATED.
	Oct 12 1999	ARGUED.

Supreme Court, U.S.
FILED

'98 942 DEC 9 - 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state can flaunt the Due Process Clause of the Fourteenth Amendment and evade federal habeas corpus relief for an incontestably innocent prisoner by claiming that an appellate decision constitutes "new law," when in fact the state did not and could not prove a key element of the crime at trial?

2. Whether the Equal Protection Clause of the Fourteenth Amendment permits a state to reverse one conviction and uphold another conviction when the two co-defendants were charged with violating the same statutory provisions; they were simultaneously tried together before the same jury; and they were convicted on the same factual record?

3. Whether federal habeas relief should be extended to protect federal constitutional rights when a state refuses to retroactively apply a case which based its decision on the already existing clear language of the statute?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Third Circuit were as follows:

Appellants: Gregory White, *Warden of the State Correctional Institution at Pittsburgh*

The Attorney General of the Commonwealth of Pennsylvania

Appellee: William Fiore

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CITATIONS TO OPINIONS

The July 21, 1998 Judgment and Opinion of the United States Court of Appeals for the Third Circuit, which appear in the Appendix, is reported at 149 F.3d 221 (1998) (No. 97-3288) (App. B and App. A, respectively). No other federal court orders related to the petition for writ of habeas corpus are reported. The petition for rehearing of the July 21, 1998 decision was denied on September 23, 1998 (App. C). The July 21, 1998 Judgment and Opinion reversed the April 24, 1997 Memorandum Order, which adopted the February 27, 1997 Magistrate Judge's Report and Recommendation of the United States Court of Appeals for the Western District of Pennsylvania (No. 96-1231). The District Court's Order and the Magistrate Judge's Report also appear in the Appendix (App. D and App. E, respectively).

Petitioner's April 10, 1987 Judgment of Sentence in the Court of Common Pleas, Criminal Division, Allegheny County, Pennsylvania is recorded at No. CC 8508740. It is unreported. The Superior Court of Pennsylvania's May 12, 1989 Memorandum Opinion affirming his judgment of sentence is unreported (No. 485 Pittsburgh 1988). The *per curiam* affirmance is reported at 563 A.2d 189 (Pa.Super. 1989). Petitioner Fiore's petition to the Pennsylvania Supreme Court for allowance of appeal was denied on March 13, 1990 at 575 A.2d 109 (Pa. 1990).

David Scarpone, co-defendant of Petitioner Fiore, was tried before the same court and the same jury as Petitioner Fiore. Scarpone's convictions also are recorded

at No. CC8508740. The August 5, 1991, reversal of Scarpone's conviction is published at *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991). On March 25, 1992, the Pennsylvania Supreme Court, in an unpublished order (without an opinion), denied Petitioner Fiore's application for extraordinary relief (No. 9 W.D. Misc. Dkt. 1992) to take jurisdiction over his case and consolidate it with the appeal of *Commonwealth v. Scarpone* to the Pennsylvania Supreme Court. The December 15, 1993 Pennsylvania Supreme Court Opinion affirming the Commonwealth Court's decision is reported at *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). The March 22, 1994 Order of the Pennsylvania Supreme Court (No. 7 W.D. Misc. Dkt. 1994) denying Petitioner Fiore's second emergency application is also unreported.

The August 18, 1994 Findings of Fact and Conclusions of Law and Order of Court from the Allegheny County Court of Common Pleas at No. CC8508740 denying Petitioner Fiore's petition for post-conviction relief is unpublished. The Pennsylvania Superior Court's September 20, 1995 opinion affirming the trial court's August 18, 1994 Order is reported at 665 A.2d 1185 (Pa. Super. 1995). The Pennsylvania Supreme Court's April 19, 1996 denial of Petitioner Fiore's petition for allowance of appeal is reported at 675 A.2d 1243 (Pa. 1996).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

On July 21, 1998 the Court of Appeals reversed a District Court order granting a petition for writ of habeas corpus (App. A – App. B and App. D – App. E). Petitioner timely filed a petition for rehearing requesting rehearing and/or rehearing *en banc*. The petition was denied by the Court of Appeals on September 23, 1998 (App. C).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

From the time of his conviction to today, Petitioner Fiore has been denied due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that he stands convicted of a crime based on evidence which indisputably does not support each essential element of the crime.

1. *United States Constitution, Amendment XIV, § 1*:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *Habeas Corpus, 28 U.S.C. § 2254(a), as amended April 24, 1996*:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

3. *Solid Waste Management Act ("SWMA"), 35 P.S. § 6018.401(a)*:

"(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department.

4. *Solid Waste Management Act ("SWMA"), 35 P.S. § 6018.606(f)*:

"(f) Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both."

5. *Rules of Strict and Liberal Construction, 1 Pa. C.S.A. § 1928(b)(1)*:

" . . . (b) All provisions of a statute of the classes hereafter enumerated shall be strictly construed:

(1) Penal provisions."

CONCISE STATEMENT OF THE CASE

The relevant facts presented are not in dispute. Petitioner, William Fiore, owned and operated a hazardous waste facility in western Pennsylvania under permit from the State's Department of Environmental Resources ("DER").[1] (App. A-3). The DER did not dispute that Fiore had obtained a permit for this facility. Fiore and the facility's general manager, David Scarpone, were charged with various criminal counts, including the "operation of

[1] Recently, the agency's name was changed to the Pennsylvania Department of Environmental Protection.

a hazardous waste disposal facility *without a permit"* in violation of Pennsylvania's Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony. (App. A-3 and App. E-2 – E-4).

The essence of this felony charge against Petitioner and Mr. Scarpone was that they criminally operated a hazardous waste facility "without a permit." (App. E-3 – E-4).[2]

It is undisputed that Petitioner Fiore and his employee Scarpone *had* a DER permit to operate the facility. The Commonwealth argued that because they operated the facility contrary to the parameters of the DER permit, the permit became "null" and, effectively, nonexistent. (App. A-3).

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revoke or suspend that permit, or must it be worded so in the permit?"

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Petitioner's counsel suggested that the proper answer to both parts of the jury's question was "no," because under the SWMA regulations no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal such revocations, suspension or modification to Pennsylvania's Environmental Hearing Board. The Court

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[2] *See also, Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993).

instructed the jury that if Petitioner's conduct was sufficiently egregious and outside the parameters of the permit, the permit was effectively revoked.

Thereafter, the jury returned with a verdict of guilty as to both Petitioner and Mr. Scarpone. Each co-defendant appealed to the Superior Court of Pennsylvania. On its own motion, the Superior Court transferred the appeals to the Commonwealth Court of Pennsylvania.[3] On Petitioner's motion, the Commonwealth Court transferred his appeal back to the Superior Court, but it retained co-defendant David Scarpone's appeal. (App. E-5).

Petitioner's appeal to the Pennsylvania Superior Court resulted in an affirmance of the conviction. The Pennsylvania Supreme Court denied Fiore's petition for allowance of appeal. *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989), *alloc. denied*, 575 A.2d 1185 (Pa. 1990); (see also App. E-5 – E-6).

Mr. Scarpone's appeal was decided by the Pennsylvania Commonwealth Court at *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). The Commonwealth Court held that since Petitioner had a permit to operate the facility, his employee Mr. Scarpone could not be convicted of operating a waste disposal facility *without a permit*. Mr. Scarpone's conviction was reversed. *Id.*; (App. E-7).

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[3] The Commonwealth Court and the Superior Court are intermediate appellate courts in Pennsylvania. (*See* App. E-5 n.2 and E-11).

The Pennsylvania Supreme Court granted the Commonwealth's petition to review *Scarpone*. (App. E-7). Meanwhile, Petitioner Fiore petitioned the Pennsylvania Supreme Court by emergency application (No. 9 W.D. Misc. Dkt. 1992) to reconsider his conviction in conjunction with its review of *Scarpone*. The Pennsylvania Supreme Court denied the emergency application. (App. E-7).

The Pennsylvania Supreme Court recognized the identity of the situations in *Scarpone* and *Fiore* when, in its opinion affirming the Commonwealth Court's reversal of Scarpone's conviction, the Pennsylvania Supreme Court held:

> **We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit** against Mr. Scarpone under the statute. Simply put Mr. Scarpone **did have a permit**.

Commonwealth v. Scarpone, 634 A.2d 1109, 1112 (Pa. 1993) (emphasis added). The Pennsylvania Supreme Court concluded:

> the alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility **without a permit** is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 P.S. § 1928(b)(1).

Scarpone, 634 A.2d at 1112 (emphasis in original). Refusing to condone the "bald fiction," the Pennsylvania

Supreme Court affirmed the Commonwealth Court's reversal of Scarpone's conviction.

Thereafter Petitioner filed another emergency application with the Pennsylvania Supreme Court (No. 7 W.D. Misc. Dkt. 1994) requesting the Court to reverse the blatant inequity of his conviction. The application was denied. (App. E-8).

Petitioner then filed a motion for post-conviction collateral relief with the trial court. (App. E-8). The trial court denied the motion and its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995), *alloc. denied* 675 A.2d 1243 (Pa. 1996).

On July 3, 1996, Petitioner Fiore filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania (No. 96-1231). Petitioner Fiore's petition raised the following two issues:

1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.

2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

(App. E-9 – E-10). In a report issued on February 27, 1997, United States Magistrate Judge Francis X. Caiazza recommended that the writ of habeas corpus be granted. (App. E-1). On April 21, 1997 United States District Court Judge Gary L. Lancaster adopted the Magistrate's Report and Recommendation and ordered that the petition for writ of habeas corpus be granted. (App. D-1 – D-2). The District

Court further ordered that Petitioner Fiore be released from the part of his incarceration that pertains to his convictions under 35 P.S. §§ 6018.401(a) and 6108.606(f). (App. D-2). The District Court's decision was based, in part, on the fact that Fiore's conviction was affirmed while his co-defendant's conviction was reversed on the same factual issue — whether a permit existed. (App. E-12, E-17 - E-18).

On July 21, 1998 the United States Court of Appeals for the Third Circuit reversed the District Court. (App. A and App. B). A petition for rehearing was denied. (App. C).

Petitioner Fiore is presently incarcerated in the State Correctional Institute at Pittsburgh, Pennsylvania for committing acts which the Pennsylvania Supreme Court, under identical facts and identical statutory provisions, has held were never criminal under the penal provisions charged.

REASONS WHY THE WRIT SHOULD BE GRANTED

An Indisputably Innocent Man Remains Incarcerated For A Crime The Commonwealth Effectively Concedes It Could Not Prove. This Writ Should Be Granted To Correct The Continuing Miscarriage Of Justice That Occurred When The Court Of Appeals Reversed The District Court's Grant Of Federal Habeas Relief.

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a).

Petitioner Fiore's conviction and incarceration run afoul of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution in that he is currently incarcerated on the basis of facts that never constituted a crime under the section of the Pennsylvania Crimes Code.

A. DUE PROCESS - INSUFFICIENCY OF THE EVIDENCE

This Court should exercise its supervisory powers and grant this Petition because a man has been stripped of his constitutional rights. The due process clause of the federal Constitution requires the Commonwealth to prove each element of the offense charged, including the lack of a DER permit, beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970); *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993). Petitioner Fiore cannot be punished by a trial court when the Commonwealth could not prove that a DER permit did not exist. Simply put, if the government admits that Petitioner Fiore had a DER permit for the facility in question, it cannot convict him of a crime in which one of the key elements is the lack of a DER permit.

The Court of Appeals erred in framing its analysis of Petitioner's due process claim as simply a request that Petitioner be afforded retroactive application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). (App. A-2). Rather, Petitioner's due process claim is a straightforward contention that the trial court had no authority to punish him because the uncontradicted evidence of record does not

establish each essential element of the crime upon which he is convicted. This Court's precedent holds that Petitioner Fiore cannot remain convicted of a crime, in violation of his constitutional guarantees, if the trial court has no authority to punish him in the first place. This fundamental principle of the American criminal justice system remains true despite technical procedural rules such as the putative nonretroactivity. *See United States v. Johnson*, 457 U.S. 537, 550 (1982), citing *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) and *Robinson v. Neil*, 409 U.S. 505, 509 (1975).

In order to convict a defendant the Due Process Clause of the Fourteenth Amendment requires "proof beyond a reasonable doubt of **every** fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364 (1970) (emphasis added).

Following *Winship*, this Court later logically ruled that claims of insufficiency of the evidence upon which to base a conviction are cognizable as a due process violation reviewable by writ of habeas corpus. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In reviewing challenges to the sufficiency of the evidence, the question for habeas corpus is not whether there was any evidence to support a conviction, but "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Sullivan v. Cuyler*, 723 F.2d 1077 (3d Cir. 1983), quoting *Jackson v. Virginia*, 443 U.S. at 319; *Paullet v. Howard*, 634 F.2d 117 (3d Cir. 1980). This case meets this burden.

The statutory section under which Petitioner was convicted reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . **unless such person . . . has first obtained a permit for the storage,** treatment and disposal of hazardous waste from the department [of environmental resources].

35 P.S. § 6018.401(a) (emphasis added). The pivotal element of this crime is the lack of a permit. The Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times. (App. A-3 and App. E-2 – E-4).

Petitioner argued during his criminal trial and on direct appeal that his possession of a permit constituted an absolute defense to this crime. (App. E-4 – E-9). That is, the undisputed evidence was clearly insufficient to establish each element of the crime. And, in fact, that is exactly what the Pennsylvania Supreme Court ruled in *Scarpone*, 634 A.2d at 1112.

Every day that Petitioner Fiore remains imprisoned, a fundamental breach of due process occurs. An innocent man who was not, could not and cannot be proven guilty of every element of the crime has been convicted. The District Court correctly invoked the writ of habeas corpus to correct this grave injustice. This Court should grant this Petition to review the Court of Appeals' erroneous reversal of the District Court. An injustice of this magnitude warrants attention by this Court.

B. DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Apart from the fact that Petitioner Fiore is incarcerated for a crime he did not commit, this case presents the related issue of a denial of his right to due process and equal protection under the law. The plethora of cases decided by this Court prohibit the Commonwealth of Pennsylvania from punishing Petitioner Fiore while setting co-defendant David Scarpone free. Scarpone has been exonerated by the Pennsylvania Supreme Court on all charges related to the charge of operating a hazardous waste facility without a permit.[4] Petitioner Fiore, meanwhile, is unjustly incarcerated for precisely that offense. The District Court corrected this injustice, but the Court of Appeals again stripped Petitioner Fiore of his constitutional rights.

1. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1 (emphasis added). As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its

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[4] As noted above, the Pennsylvania Supreme Court affirmed the intermediate appellate court's decision to reverse Scarpone's conviction on the basis that the Commonwealth factually could not prove all the elements of the crime because Scarpone and Fiore had a DER permit. *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993).

terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). The Equal Protection Clause guarantees that local, state and federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications which lead to invidious discrimination. *See Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303 (1879), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

Governmental actions which purposefully impair a fundamental right or deal with a "suspect classification," are subject to "strict scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Under this standard of review, the government-made classification or treatment is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972).

Involved here is impairment of Petitioner's fundamentally protected right to liberty.[5] Accordingly, the

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[5] The concept that personal liberty is a fundamentally protected right underlies the basic reasoning for the federal habeas statute. In *Lehman v. Lycoming County Children's Services*, 648 F.2d 135 (3d Cir. 1981), the court recognized that the primary purpose of federal habeas proceedings is to protect a citizen's fundamental right to be free of being wrongfully held in

Commonwealth must establish a compelling reason for its refusal to treat Petitioner similar to Mr. Scarpone.

2. The Due Process Clause

The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 559 (1974), citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A penal statute "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976).

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custody. It is the allegation of an unlawful restriction on personal liberties which compels the court to review an otherwise final decision; that is, improper restrictions on personal liberties outweigh the otherwise compelling interest in the finality of litigation. *Id.* at 139.

As Justice Brennan wrote for the Supreme Court majority in *Fay v. Noia*, 372 U.S. 391 (1963):

> Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Id. at 424.

The facts clearly establish: (1) that Petitioner has been treated dissimilarly from Mr. Scarpone, based on the evidence and law; and (2) that the Commonwealth has no compelling reason for this difference.

Case law, as set forth below, supports Petitioner's contention that he has been denied due process and equal protection of the law of Pennsylvania. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), the Court was faced with a factual situation similar to the one at bar. On a writ of *coram nobis*, it was asked retroactively to apply a United States Supreme Court decision to a prior conviction. In deciding to grant the writ of *coram nobis*, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971), and determined that its decision was based on "the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law" and that this is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Liguori*, 438 F.2d at 669.

Similarly, in *Davis v. United States*, 417 U.S. 333 (1974), the Court stated that if the habeas petitioner's contentions were true that his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346.

Finally, the *Davis* Court concluded:

> In this case, the petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

417 U.S. at 346-47 (internal citations omitted).

Here, as in *Davis*, Petitioner Fiore is incarcerated for actions that are not criminal, as determined by the highest court of Pennsylvania. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's rights to due process and the equal application of the law. There is no rational basis, let alone a compelling reason, for setting Mr. Scarpone free while continuing to punish Petitioner Fiore. Further, the erratic, unjustifiable treatment constitutes a situation cognizable under the habeas corpus statute. The continued deprivation of Petitioner Fiore's constitutional rights should be addressed by this Court.

C. RETROACTIVE APPLICATION OF SCARPONE DECISION

The final issue, which relates to the grounds upon which the Court of Appeals rationalized the reversal of the grant of habeas relief, raises an important issue of how the principle of nonretroactivity applies. This principle prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), citing *Stringer v. Black*, 503 U.S. 222 (1992).

In this case the Court of Appeals reversed the District Court's grant of habeas relief by artificially characterizing the relief sought as a violation of the prohibition against retroactively applying a new rule of law. (App. A-2).

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court clarified how the question of retroactivity should be resolved for cases on collateral review. A plurality of this Court refused to reach the merits of the case, holding that as a general rule *new* rules of law should not be applied retroactively on collateral review. *Id.* at 310.

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Thus to determine whether a ruling is "new," this Court must "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

In this case, the alleged new rule of law arose from an intermediate appellate court-decision reversing David Scarpone's conviction which was affirmed by the Pennsylvania Supreme Court. *See Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (1993). However, there was no new rule of law. The Supreme Court simply held that the facts did not support a conviction because a DER permit existed. *Id.* at 1112. Petitioner and his co-defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. Petitioner Fiore is simply seeking consistency on the basis of the same facts.

The *Scarpone* Court's succinct opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, the decision is based simply on the black letter principle that penal statutes must be strictly construed. The *Scarpone* decision is one of straight forward statutory construction; in no way does it revise or reverse previous case law, nor has the Commonwealth posited such an argument. Moreover, this principle itself is embraced by statute. *See* 1 Pa. C.S.A. § 1928(b)(1).

Further, a review of Pennsylvania case law reveals no decisions upon which the Commonwealth reasonably could have relied in prosecuting Petitioner under its interpretation of the law. The obvious result reached by the Pennsylvania Supreme Court was first reached by the Commonwealth Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather only

interpreted an existing statute. This construction is supported by decisions of the United States Supreme Court. For example, in *McNally v. United States*, 483 U.S. 350 (1987), this Court considered the scope of the mail fraud statute, 18 U.S.C. § 1341, which prohibits the use of mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The Court held that the mail fraud statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government.

Subsequent to the United States Supreme Court's decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett* (No. 87-C-8978 (85-CR-284) N.D. Ill. 1988) (App. F), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of his petition was this Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals. (App. F-1).

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a way consistent with the terms of the statute. (App. F-8 – F-10).

Other courts have collaterally set aside mail fraud convictions, based on the retroactive application of *McNally*. *See United States v. Wade*, 672 F.Supp. 864, 875 n.5 (D.Md. 1987). The *Wade* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos*:

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck*, 318 U.S. at 243, "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners' conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

United States v. Wade, 672 F. Supp. 864, 873-874 (D.Md. 1987) (citations omitted). Likewise, in Pennsylvania, the courts may not create crimes, but rather are confined to a strict construction of the Criminal Code. *See* 1 Pa. C.S.A. § 1928(b)(1); *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (penal provisions of a statute must be strictly construed).

Similarly in the instant case, the Pennsylvania Supreme Court's decision that Mr. Scarpone's [and Petitioner's] conduct did not constitute a violation of the criminal charge imposed does not constitute a new rule of law.

The general rule against the retroactive effect of a "new" statement of law generally involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Miranda v. Arizona*, 384 U.S. 436 (1966). As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are retroactively applied only if they affect the truth-finding process. Here, however, as the District Court noted, the Pennsylvania Supreme Court's ruling in *Scarpone* simply decided which of two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct and, critically, what are the actual elements of the offense. (App. E-11 – E-12; E-14 – E-15).

The Commonwealth cannot argue that it was surprised by the Pennsylvania Supreme Court's decision. Indeed the very issue underlying this scenario, that is whether the DER permit was repudiated by Petitioner's and Mr. Scarpone's actions, was raised during the course of the trial when the trial judge was asked to clarify the instructions to the jury. As such, the nonretroactivity principle has no role in this case.

The Court of Appeals decision in this case distorts this Court's nonretroactivity principle. It expands its scope far beyond this Court's original intentions. The impact is that no remedy exists for a state prisoner who is imprisoned in violation of his due process rights. The Third Circuit's ruling negates the role for habeas corpus relief intended by Congress.

In the alternative, even assuming *arguendo* that Petitioner was seeking the benefit of a new rule, the *Scarpone* decision falls within exceptions to the nonretroactivity principle.[b] *See Gilmore v. Taylor*, 508 U.S. 333, 345 (1993). Specifically, the *Scarpone* decision determined that the primary conduct of co-defendants David Scarpone and Petitioner Fiore was beyond criminal sanction. Thus, Petition Fiore is entitled to the benefit of that decision.

This exception to the nonretroactivity principle was fully explained in *Mackey v. United States*, 401 U.S. 667, 675 (1971), which explains that nonretroactivity, as a general matter, applied to new " 'procedural due process' rules, that is, those applications of the constitution that

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[b] This Court has held that two exceptions apply to this rule. The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *Saffle v. Parks*, 494 U.S. at 495. This second exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson*, 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), *aff'd* 536 F.2d 1013 (3d Cir. 1976).

forbid the government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior." *Id.* at 692. However, the *Mackey* court explained:

> new "substantive due process" rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the Writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

401 U.S. at 693 (footnotes omitted).

Mackey referred to that Court's earlier decision *United States v. United States Coin & Currency*, 401 U.S. 715 (1971), in support of this quotation. In *United States Coin & Currency*, this Court ruled that its earlier decisions that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment

defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct could not constitutionally be held criminal. *Id.* at 724; *see also Robinson v. Neil*, 409 U.S. 505, 509 (1973).

Similarly here, Petitioner's conduct, as admitted by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, even if the *Scarpone* decision was a "new rule," the facts of this case fall within the exception to the nonretroactivity principle.

The Court of Appeals' refusal to follow the well-established nonretroactivity rule and its carved out exceptions set forth by this Court creates a split from the other Circuits that properly apply this Court's rule. As a result, citizens within the jurisdiction of the Third Circuit have lesser rights to avoid basic injustice of wrongful conviction and confinement than do those of other Circuits. This Court should grant this Petition to protect citizens including Petitioner Fiore from such a fundamental disparity.

CONCLUSION

In this action, Petitioner Fiore seeks to remedy a breach of his due process rights which has rendered him incarcerated for years based on his conviction of a crime of operating a solid waste disposal facility without the required state permit, when his employee, who was charged and convicted of the same crime, was released from that conviction by the Pennsylvania Appellate

Courts. For ten years, Petitioner Fiore has brought this issue to the attention of the Pennsylvania State Courts seeking nothing more than to be treated equally to Scarpone, his one-time employee and co-defendant. For unfathomable reasons, Pennsylvania Courts refuse to give Petitioner Fiore relief from this conviction which is indisputably based on insufficient evidence. Upon exhausting all remedies in state court, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania and was afforded the relief he requested. Thereafter, the Third Circuit Court of Appeals reversed that decision based upon an unconstitutional analysis which denies liberty to an innocent man as it endangers the freedom of the citizenry.

To remedy this miscarriage of justice, Petitioner William Fiore urges this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Filed July 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3288

WILLIAM FIORE

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 96-01231)

Argued on March 9, 1998

Before: STAPLETON and ALITO, *Circuit Judges*, and SHADUR, *District Judge**

(Opinion Filed: July 21, 1998)

D. MICHAEL FISHER
Attorney General
WILLIAM H. RYAN, JR.
Executive Deputy Attorney General
ROBERT A. GRACI
Chief Deputy Attorney General

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*Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

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OPINION OF THE COURT

ALITO, *Circuit Judge:*

This is an appeal from an order granting a writ of habeas corpus to William Fiore, a state prisoner in Pennsylvania. The district court granted the writ after concluding that the Supreme Court of Pennsylvania violated Fiore's constitutional rights by failing to apply one of its decisions retroactively. Because state courts are under no constitutional obligation to apply their decisions retroactively, we reverse.

I.

William Fiore owned and operated a waste disposal facility in Elizabeth Township, Pennsylvania, during the late 1970s and early 1980s. In 1983, after the Pennsylvania Department of Environmental Resources (DER) discovered that hazardous wastes were seeping into a monitoring pipe underneath the facility, Fiore instructed the facility's general manger, David Scarpone, to alter the flow of the monitoring pipe. The alteration allowed hazardous wastes to be deposited surreptitiously in a nearby tributary while clean water flowed through the inspected portion of the monitoring pipe. State officials discovered the alteration in 1984 and brought criminal charges against Fiore and Scarpone under the Pennsylvania Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.101.

Among other things, the criminal information charged that Fiore and Scarpone operated a hazardous waste facility without a permit in violation of 35 P.S. § 6018.401(a), a second degree felony under 35 P.S. § 6018.606(f). Although the state did not dispute the fact that Fiore had obtained a permit from the DER, Supp.App. at 51, the state proceeded on the theory that Fiore and Scarpone "so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation." *Id.* at 52. Following a jury trial, Fiore and Scarpone were convicted of operating a hazardous waste facility without a permit in violation of §§ 401(a) and 606(f). After a separate non-jury trial involving additional allegations of unauthorized activities, Fiore again was convicted of operating a hazardous waste facility without a permit in violation of

§§ 401(a) and 606(f).[1] On April 10, 1987, the Court of Common Pleas sentenced Fiore to a prison term of two and one-half to five years, plus ten years' probation, for the jury-trial conviction under §§ 401(a) and 606(f). The court then sentenced Fiore to a consecutive prison term of two and one-half to five years, plus ten years' probation, for the non-jury-trial conviction under §§ 401(a) and 606(f). In addition, the court imposed a fine of $100,000 for each conviction under §§ 401(a) and 606(f).

On direct appeal to the Pennsylvania Superior Court,[2] Fiore contended that there was insufficient evidence to sustain his convictions under §§ 401(a) and 606(f) in light of the fact that he possessed a permit to operate a hazardous waste facility. The Superior Court rejected this argument and adopted the trial court's reasoning that Fiore's actions "represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was 'un-permitted.' " App. 51, 63-64, 125-26. Fiore's convictions became final when the Supreme Court of Pennsylvania denied his petition for allowance of appeal on March 13, 1990.

More than a year after Fiore exhausted his direct appeal, the Commonwealth Court of Pennsylvania

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[1] Between his two trials, Fiore was convicted of sixty counts of violating the SWMA and other statutes. Only the § 401(a) convictions are at issue here.

[2] While the Commonwealth Court normally exercises jurisdiction over appeals from SWMA convictions, Fiore successfully petitioned to have his case transferred to the Superior Court. *See Commonwealth v. Fiore*, 665 A.2d 1185, 1187 (Pa. Super. Ct. 1995). As a result, Fiore and Scarpone had their appeals heard by different courts.

reversed Scarpone's conviction under §§ 401(a) and 606(f). *Scarpone v. Commonwealth*, 596 A.2d 892, 895 (Pa. Commw. Ct. 1991). The Commonwealth Court concluded that *Scarpone* could not be convicted of operating a hazardous waste facility without a permit when Fiore actually possessed a permit for the facility. *Id.* In reaching this conclusion, the court explained that it would have been more appropriate to charge *Scarpone* with violating the terms of a permit, a first-degree felony under the SWMA. *Id.* The Supreme Court of Pennsylvania granted review in Scarpone's case, and Fiore filed a petition for extraordinary relief asking the Supreme Court to consolidate his case with Scarpone's. After denying Fiore's petition, the court affirmed the reversal of Scarpone's conviction. *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993). The court explained:

> The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. . . . We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one.

Id.

Following the Supreme Court of Pennsylvania's decision in *Scarpone*, Fiore again sought extraordinary relief, and again his application was denied. Fiore then filed a

petition pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 P.S. § 9541, claiming that what he was "charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." Supp.App. at 14. The Court of Common Pleas and the Superior Court both denied Fiore's petition on the ground that Pennsylvania law does not allow post-conviction relief in cases where the alleged error was litigated on direct appeal. Supp.App. at 22; *Commonwealth v. Fiore*, 665 A.2d 1185, 1192-93 (Pa. Super. Ct. 1995). In addition, the Superior Court refused to apply the *Scarpone* decision retroactively based on state-law principles of retroactivity. *Id.* at 1193. The Supreme Court of Pennsylvania subsequently denied Fiore's petition for allowance of appeal from the Superior Court's decision.

Fiore then filed a petition for a federal writ of habeas corpus. The petition presented two issues:

> 1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.
>
> 2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

Report of the Magistrate Judge at 11-12.

The magistrate judge concluded that the Supreme Court of Pennsylvania's "failure to grant relief pursuant to *Scarpone* . . . served to deny Fiore due process of law and equal protection of the law." *Id.* at 20. Accordingly, the magistrate judge "recommended that Fiore's petition

for [a] writ of habeas corpus be granted" and "further recommended that the grant of the writ should be accomplished through the retroactive application of" *Scarpone*. *Id.* at 22. The district court adopted the report and recommendation of the magistrate judge and ordered that Fiore be released from the portion of his sentence pertaining to both the jury and non-jury trial convictions under §§ 401(a) and 606(f).

On appeal, the Commonwealth challenges the district court's conclusion that the federal Constitution requires retroactive application of *Scarpone*. We exercise plenary review over this purely legal conclusion. *Yohn v. Love*, 76 F.3d 508, 515 (3d Cir. 1996).

II.

To be eligible for a federal writ of habeas corpus, a state prisoner must show that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).[3] Fiore contends that he meets this requirement because, under the Supreme Court of Pennsylvania's decision in *Scarpone*, his conduct does not constitute the crime with which he was charged. *See In re Winship*, 397 U.S. 358, 364, (1970) ("[T]he Due Process

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[3] Because Fiore filed his § 2254 petition after April 24, 1996, he is subject to the additional requirements of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, § 104, 110 Stat. 1214, 1218-19. However, since we conclude that Fiore cannot succeed on the merits of his claim, we need not decide whether Fiore exhausted his claim, *id.* § 104(b), or whether the state courts adjudicated his claim on the merits. *id.* at § 104(d).

Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Fiore's argument would have force had *Scarpone* been the law in Pennsylvania at the time of his conviction. However, *Scarpone* was decided after Fiore's conviction became final, and the Pennsylvania courts refused to apply the decision to Fiore's case based on state retroactivity principles. *See Commonwealth v. Fiore*, 665 A.2d 1185, 1193 (Pa. Super. Ct. 1995). Since "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68, (1991), Fiore is entitled to relief only if federal law requires retroactive application of *Scarpone*.

The district court held, and Fiore maintains on appeal, that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require retroactive application of *Scarpone*. This conclusion, however, is at odds with the Supreme Court's longstanding position that "the federal constitution has no voice upon the subject" of retroactivity. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). *See Solem v. Stumes*, 465 U.S. 638, 642 (1984); *United States v. Johnson*, 457 U.S. 537, 542 (1982). While the Court has concluded that some federal criminal decisions should apply retroactively, *see Davis v. United States*, 417 U.S. 333, 346-47 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971), it has made clear that state courts are under no constitutional obligation to apply their own criminal decisions retroactively. *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973). Thus, just as the Supreme Court has

fashioned retroactivity rules for the federal courts based on principles of judicial integrity, fairness, and finality, *see Teague v. Lane*, 489 U.S. 288, 304-310 (1989), the state courts are free to adopt their own retroactivity rules after independent consideration of these and other relevant principles. As the Supreme Court explained in *Sunburst Oil*:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The alternative is the same whether the subject of the new decision is common law or statute. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. . . . [W]e are not at liberty, *for anything contained in the constitution of the United States*, to thrust upon those courts a different conception of the binding force of precedent or of the meaning of judicial process.

287 U.S. at 364-66 (emphasis added) (citations omitted).

Consistent with the Supreme Court's admonition that federal courts not require retroactive application of state judicial decisions, this court has refused to require application of new state decisions in habeas proceedings. In *Martin v. Warden, Huntingdon State Correctional Institution*, 653 F.2d 799 (3d Cir. 1981), the petitioner claimed that the trial court's jury instructions misstated the requirements of the Pennsylvania felony-murder rule. *Id.* at 810. Although the Supreme Court of Pennsylvania rejected

Martin's argument on direct appeal, it subsequently interpreted the felony-murder rule in a manner that cast doubt on the charge given in Martin's case. *Id.* at 810-11. We rejected Martin's argument for retroactive application of the new decision, stating:

> Even were [the new decision] to be given retroactive effect . . . it would not be the responsibility of a federal court to apply this newly formed state decisional law to a state conviction obtained almost a decade ago. Martin's remedy on such a claim is not in this court. Therefore, under the *then-existing* Pennsylvania law of felony murder, the judge adequately charged the jury. . . .

Id. at 811 (emphasis added). *Accord Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir. 1995) (denying habeas relief to a state prisoner because "[n]o federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively"). In light of this court's decision in *Martin*, as well as the Supreme Court's rulings in *Sunburst Oil* and *Wainwright*, we must reject Fiore's argument that the constitution requires retroactive application of the *Scarpone* decision.

Our conclusion is not altered by Fiore's reliance on *Davis v. United States*, 417 U.S. 333, 346 (1974). In *Davis*, the Supreme Court reviewed a § 2255 petition filed by a federal prisoner who had been convicted under the Selective Service Act for failing to comply with an induction order. On Davis' direct appeal, the Ninth Circuit had concluded that his induction order was valid and that he could be prosecuted for failing to comply with the order.

In a subsequent case, however, the same court found that an induction order issued under "virtually identical" circumstances was "illegal and created no duty on[the defendant's] part to report for induction." *Id.* at 339-40. *Davis* filed a § 2255 petition based on the new Ninth Circuit decision, and the Supreme Court held that *Davis* raised a cognizable claim. The Court explained:

> If [Davis'] contention is well taken, then [his] conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255.

Id. at 346-47 (internal quotations and alterations omitted).

Based on *Davis*, Fiore contends that he is entitled to retroactive application of the *Scarpone* decision. However, Fiore's argument fails to account for the fact that *Davis* concerned the interpretation of a federal, not state, statute. Section 2255 allows federal prisoners tc assert habeas claims if their confinement is "in violation of the Constitution *or laws* of the United States." 28 U.S.C. § 2255 (emphasis added). Since *Davis* claimed that his conviction resulted from an improper construction of a federal statute, the Supreme Court allowed him to seek relief without alleging a violation of the Constitution. *See Davis* 417 U.S. at 342-346 (relying solely on the "or laws" language of § 2255). Fiore, by contrast, must allege a violation of the Constitution since there is no federal statute at issue in his case. Given that the *Davis* Court never mentioned a constitutional basis for its decision, and given that the Supreme Court explicitly has held that the Constitution

does not require retroactive application of state criminal decisions, *Wainwright*, 414 U.S. at 23-24, we reject Fiore's contention that he has a due process right under *Davis* to have the *Scarpone* decision applied retroactively.[4]

We likewise are unconvinced by Fiore's equal protection argument. Fiore maintains that Pennsylvania is treating him differently from *Scarpone* with respect to his "fundamentally protected right to liberty." Appellee's Br. at 17-18. Admittedly, this argument has intuitive appeal: Fiore and Scarpone were tried together for the same crime, convicted on the same facts, and the Pennsylvania courts have concluded that Fiore can be imprisoned while *Scarpone* must be released. Nevertheless, Fiore's equal

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[4] In holding that the *Davis* retroactivity rule is not required by the Due Process Clause, we join several other circuits. *See Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997); *Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996), *cert. granted on other grounds*, 118 S.Ct. 361 (1997); *Brennan v. United States*, 867 F.2d 111, 121 (2d Cir. 1989).

We note that the Supreme Court recently reaffirmed *Davis* in *Bousley v. United States*, 118 S.Ct. 1604, 1610 (1998). *Bousley* involved a federal prisoner who filed a motion under 28 U.S.C. § 2255 seeking retroactive application of the Supreme Court's interpretation of 18 U.S.C. § 924(c)(1) in *Bailey v. United States*, 516 U.S. 137, 144 (1995). The *Bousley* Court held that *Bailey*'s interpretation of § 924(c)(1) was fully retroactive, explaining that "under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 118 S.Ct. at 1610. *See also id.* at 1612 (Stevens, J., concurring) (*Bailey* "did not change the law. It merely explained what § 924(c) had meant ever since the statute had been enacted."). Because the *Bousley* decision rested on the Supreme Court's understanding of the balance of power in the federal system, it differs critically from the current case, which involves a state court's refusal to give retroactive effect to a judicial interpretation of a state statute.

protection claim cannot be reconciled with the Supreme Court's retroactivity jurisprudence. While the Court has recognized that "the principle of treating similarly situated defendants the same" should be considered in shaping federal retroactivity rules, *Teague v. Lane*, 489 U.S. 288, 304 (1989) (plurality), the Court never has tied application of this principle to the Equal Protection Clause. In fact, the *Teague* rule itself – which largely denies the benefit of new constitutional rules to defendants on collateral review, *id.* at 310 – inevitably results in the differential treatment of defendants who, while convicted at the same time, exhaust their direct appeals at different times. Were we to accept Fiore's equal protection argument, we would be casting doubt on *Teague* and its progeny. Moreover, we would be carving out an exception to the rule that the "the federal constitution has no voice upon the subject" of retroactivity. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). *See Solem v. Stumes*, 465 U.S. 638, 642 (1984); *United States v. Johnson*, 457 U.S. 537, 542 (1982); *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973). Since it is not the role of this court to second guess the decisions of the Supreme Court, we reject Fiore's claim that the Equal Protection Clause requires the *Scarpone* decision to be retroactively applied.

In sum, we conclude that neither the Due Process Clause nor the Equal Protection Clause mandates retroactive application of the Supreme Court of Pennsylvania's decision in *Scarpone*. Accordingly, we reverse the district court's grant of a writ of habeas corpus.

When a decision providing a new interpretation of a state criminal statute is not made fully retroactive, some defendants convicted prior to the new interpretation will

almost always continue to suffer the consequences of a conviction based on conduct that would not constitute a crime under the new interpretation, and that is the fate that has befallen Fiore. His situation is particularly striking because the new interpretation was handed down by the state courts in his co-defendant's appeal, which happened to follow a different procedural track. However, any relaxation of the Pennsylvania rules regarding retroactivity due to the particular circumstances present in this case must come from the Pennsylvania courts or the governor. Although we might be inclined to grant relief if it were within our power, the limitations of our authority under the habeas corpus statute prevent us from doing so.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3288

WILLIAM FIORE

v.

GREGORY WHITE, Warden of the state Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 96-01231)

Present: Stapleton and Alito, *Circuit Judges*, and Shadur, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 9, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District court entered April 25, 1997, be, and the same is

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* Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

hereby reversed. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: July 21, 1998

Certified as a true copy and issued in lieu of a formal mandate on October 1, 1998.

Teste: /s/ P. Douglas Sisk
Clerk,
United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-3288

WILLIAM FIORE

Appellant,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, STAPLETON, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, McKEE, and
RENDELL, *Circuit Judges*, and
SHADUR, *District Judge**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

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* As to panel rehearing only.

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Scirica
Circuit Judge

DATED: SEP 23, 1998
Sma CCTO:JL, HG, AM, MC

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, v. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	)	Civil Action No. 96-1231 Re: Docs. # 1, 12, 13 and 14 JUDGE LANCASTER MAGISTRATE JUDGE CAIAZZA

MEMORANDUM ORDER

Petitioner's petition for writ of habeas corpus was received by the Clerk of Court on June 28, 1996, and was referred to United States Magistrate Judge Francis X. Caiazza for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on February 27, 1997, recommended that the petition be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on

petitioner by delivery to his counsel James B. Lieber by First Class United States Mail and on the respondents. Objections were filed by the respondents on March 14, 1997. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 24th day of April, 1997.

IT IS HEREBY ORDERED that the petition for writ of habeas corpus filed by the petitioner is granted.

IT IS FURTHER ORDERED that the respondents shall release the petitioner from the portion of his incarceration which pertains to the consecutive sentences imposed for the jury and the non-jury trial convictions under 35 P.S. Section 6018.401(a) and Section 6018.606(f).

The report and recommendation of Magistrate Judge Caiazza, dated February 27, 1997, is adopted as the opinion of the court.

/s/ Gary L. Lancaster
GARY L. LANCASTER
United States
District Court Judge

cc: Francis X. Caiazza
U.S. Magistrate Judge

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, v. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	Civil Action No. 96-1231 Re: Doc. # 1 JUDGE LANCASTER MAGISTRATE JUDGE CAIAZZA

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I.

RECOMMENDATION

It is recommended that the petition for writ of habeas corpus filed by the petitioner, William Fiore, at document number one be granted.

II

REPORT

On February 18, 1986, a jury in the Allegheny County Court of Common Pleas (Court of Common Pleas) convicted Petitioner William Fiore (Fiore) of violating the Pennsylvania Solid Waste Management Act (SWMA), 35 P.S. Sections 6018.101 *et. seq.*, (Resp. to Pet. For Writ of Habeas Corpus Ex. C at 2.) Based upon conflicting judgments from the intermediate appellate courts of Pennsylvania, Fiore's petition for writ of habeas corpus (petition) raises a complex federal constitutional challenge to his conviction involving the retroactive application of a Pennsylvania Supreme Court decision. For purposes of clarity, the report section shall detail the lengthy procedural history of this case and shall summarize the underlying facts as stated by the Commonwealth Court of Pennsylvania (Commonwealth Court).

A. Facts[1]

In 1979, the Pennsylvania Department of Environmental Resources (DER) granted Fiore a permit to operate a waste disposal facility in Elizabeth Township, Allegheny County Pennsylvania. The facility included an underground monitoring pipe which inspectors from the DER used to monitor the leakage of hazardous wastes from a pit which held industrial wastes. Inspectors from the DER discovered hazardous wastes leaking from the

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[1] The facts set forth in this section were summarized from the opinion of the Commonwealth Court filed at *Scarpone v. Commonwealth*, 141 Pa. Cmwlth. 560, 596 A.2d 896 (1991).

pit in 1982 and 1983 and informed Fiore that future deposits to the pit would not be approved until the leakage was rectified.

Fiore subsequently instructed David Scarpone (Scarpone), the facility's general manager, to alter the flow of the monitoring pipe in July 1983. His order was accomplished by excavating the area around the monitoring pipe, capping its intake, and installing a smaller pipe to bring uncontaminated water to the monitoring pipe. Inspectors from the DER discovered the alteration and criminal charges were then filed against Fiore and Scarpone under the SWMA. Count I of the charges filed against Fiore stated the following:

> The defendant William Fiore did operate a hazardous waste disposal facility without a permit from the DER for such disposal facility, to wit, the defendant operated his hazardous waste disposal facility in Elizabeth Township, Allegheny County following alterations, carried out by accomplices and others acting under his direction, of its approved monitoring pipes in 1983 without a permit from the DER for such a facility, in violation of 35 P.S. § 6018.401(a), a felony of the second degree pursuant to 35 P.S. § 6018.606(f).

Fiore and Scarpone were tried as co-defendants in a jury trial held in the Court of Common Pleas. At the close of the jury trial, Fiore was convicted of Disposing of Hazardous Wastes and Operating a Hazardous Waste Facility Without a Permit, Discharging Industrial Wastes Without a Permit, Disposing of Residual Wastes and Operating a Residual Waste Facility Contrary to his Permit, Perjury, Obstruction of Administration of the Law

and Criminal Conspiracy. (Resp. To Pet. for Writ of Habeas Corpus Ex. C at 2.) Scarpone was convicted of causing and assisting in the operation of a hazardous waste disposal facility without a permit in violation of the SWMA, Obstructing the Administration of Law and Other Government Functions, and Conspiracy. *Commonwealth v. Scarpone*, 141 Pa. Cmwlth 560, 596 A.2d 892 (1991).

Fiore was also tried separately in a non-jury trial on July 2, 1986, on charges which did not pertain to Scarpone. At the close of that trial, Fiore was convicted of Discharging Industrial Wastes Without a Permit, Disposing of Hazardous Wastes and Operating a Hazardous Waste Disposal Facility Without a Permit, Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit, Using Property and Property of Another as a Solid Waste Disposal Area Without a Permit, and Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit. (Resp. to Pet. for Writ of Habeas Corpus Ex. C at 2.)

B. Procedural History

As appears *supra*, a jury in the Court of Common Pleas convicted Fiore and his co-defendant, David Scarpone (Scarpone), of violating sections 401(a) and 606(f) of the SWMA. On April 10, 1987, the Court of Common Pleas sentenced Fiore to a term of incarceration of two and one half years to five years and imposed a fine of $100,000 for the SWMA conviction which was related to the jury trial. (Br. in Supp. of Pet. for Writ of Habeas Corpus at 7; Resp. to Pet. For Writ of Habeas Corpus, Ex.

C at 3.) That same day the Court of Common Pleas also sentenced Fiore to a consecutive period of incarceration of two and one half years to five years and imposed a fine of $100,000 for the SWMA conviction which was related to the non-jury trial.

Fiore and Scarpone both appealed their respective judgments of sentence that were imposed by the Court of Common Pleas. Fiore appealed to the Superior Court of Pennsylvania (Superior Court); Scarpone appealed to the Commonwealth Court of Pennsylvania (Commonwealth Court).[2] (*Id.*) The Superior Court *sua sponte* transferred Fiore's appeal to the Commonwealth Court; however, upon Fiore's motion, his appeal was subsequently transferred back to the Superior Court. (Id. at I.)

On May 12, 1989, the Superior Court filed a memorandum opinion which affirmed Fiore's judgment of sentence for the convictions from both the jury and the non-jury trials. (Resp. to Pet. For Writ of Habeas Corpus Ex. 5.) Although Fiore's appeal to the Superior Court raised twenty-two issues, the court did not analyze the merits of any of the claims. Instead, the Superior Court affirmed solely upon the opinion of the Court of Common Pleas which specifically stated the following:

> [T]he defendant's alterations of the 810 pipe represented such a significant departure from

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[2] The Commonwealth Court has jurisdiction over appeals involving the SWMA pursuant to 42 Pa. C.S. Section 762(a)(2)(ii). The Superior Court has appellate jurisdiction over all appeals from a final order of a court of common pleas. 42 Pa. C.S. Section 742.

> the terms of the existing permit that the operation of the hazardous waste facility was "unpermitted" after the alterations were taken. Contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which allowed the disposal of hazardous waste after the monitoring system was altered.

(*Id.* Ex. 5 at 2 and 3; *Commonwealth v. Fiore*, 445 Pa Super. 401, 415-6, 665 A.2d 1185, 1192 (1995).) On March 13, 1990, Fiore's direct appeal was concluded after the Supreme Court of Pennsylvania (Supreme Court) denied his petition for allowance of appeal filed at No. 310 W.D. Allocatur Docket 1989. (Br. in Supp. of Pet. For Writ of Habeas Corpus at 8.)

The Commonwealth Court did not enter judgment on Scarpone's appeal until a year after Fiore's direct appeal became final. However, on August 5, 1991, the Commonwealth Court reversed Scarpone's conviction in an opinion published as *Scarpone v. Commonwealth*, 141 Pa. Cmwlth. 560, 596 A.2d 892 (1991). The Commonwealth Court noted that Scarpone had been charged with violating section 401(a) and section 606(f) of the SWMA. *Scarpone v. Commonwealth*, 141 Pa. Cmwlth. 560, 596 A.2d 892 (1991). Section 401(a) provides, in pertinent part:

> . . . no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department. . . .

35 P.S. Section 6018.401(a). Section 606(f) states:

> Any person who stores, transports, treats or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both.

35 P.S. Section 6018.606(f)

The Commonwealth Court strictly interpreted the language and the penal nature of these provisions. *Scarpone,* 141 Pa. Cmwlth. at 567, 596 A.2d at 895 (1991). It essentially concluded that Scarpone could not be convicted of operating a hazardous waste facility without a permit because the DER had issued a valid permit for the operation of the facility. *Id.*

After Scarpone's conviction was reversed, the Supreme Court granted the petition for allowance of appeal filed by the Commonwealth. (Pet. for Writ of Habeas Corpus at 8.) During the pendency of this appeal, Fiore filed an Application for Extraordinary Relief in the Supreme Court which argued that the Commonwealth Court's reversal in Scarpone's appeal and the Superior Court's affirmance in his appeal were contradictory and inherently unfair. (*Id.*) On March 25, 1992, the Supreme Court denied Fiore's application.

On December 15, 1993, the Supreme Court affirmed the Commonwealth Court in an opinion published as *Commonwealth v. Scarpone,* 535 Pa. 273, 634 A.2d 1109

(1993). The Supreme Court initially recognized that the clearly conflicting opinions of the Superior Court and the Commonwealth Court "[left] the Attorney General's office ill-advised on how it should proceed . . . " *Commonwealth v. Scarpone,* 535 Pa. 273, 278, 634 A.2d 1109, 1112. (1993). In concurrence with the rationale of the Commonwealth Court, the Supreme Court determined that Scarpone could not be convicted of operating a waste disposal facility without a permit under section 401(a) because the DER had, in fact, issued a permit. *Scarpone,* 535 Pa. at 278-9, 634 A.2d at 1111-2. The Supreme Court also confirmed that the penal provisions of a statute should be strictly construed and that it would have been more appropriate to charge Scarpone under the provisions of the SWMA which pertain to violations of the conditions of a permit. (*Id.*)

On January 24, 1994, Fiore filed an Emergency Petition for Extraordinary Relief in the Supreme Court. (Pet. For Writ of Habeas Corpus at 9.) The motion requested the Supreme Court to exercise plenary jurisdiction pursuant to its King's Bench powers. The Supreme Court denied Fiore's emergency petition on March 22, 1994. (*Id.*)

On March 28, 1994, Fiore filed a Petition for Post Conviction Collateral Relief (PCRA) under 42 Pa. C.S.A. Section 9545 *et. seq.* in the Court of Common Pleas. His PCRA petition requested the court to vacate his sentence because the Supreme Court determined in *Commonwealth v. Scarpone,* 535 Pa. 273, 634 A.2d 1109 (1993) that he did not, in fact, violate the section of the SWMA which served as the basis of his charge. (Resp. to Pet. For Writ of Habeas Corpus, Ex. K at 8.) On August 18, 1994, the Court of Common Pleas denied Fiore's PCRA petition on

the basis that the Supreme Court did not issue its decision in Scarpone's appeal until approximately four years after Fiore's direct appeal became final. (Resp. to Pet. For Writ of Habeas Corpus Ex. H.)

Next, Fiore appealed the denial of his PCRA petition to the Commonwealth Court on August 29, 1994; however, upon the motion of the Commonwealth, it transferred Fiore's appeal to the Superior Court. (Pet. For Writ of Habeas Corpus at 10.) On September 20, 1995, the Superior Court affirmed the Court of Common Pleas in an opinion published as *Commonwealth v. Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995). (Resp. to Pet. For Writ of Habeas Corpus, Ex. K.) The Superior Court concluded that Fiore was not eligible for collateral relief because his allegation of error had been previously litigated. The Superior Court also concluded pursuant to *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986), that Fiore was not entitled to a retroactive application of the Supreme Court's decision in *Scarpone* because his direct appeal was already final when the Supreme Court filed its opinion.

In an Emergency Application for Extraordinary Relief filed on October 18, 1994, Fiore again urged the Supreme Court to exercise its King's Bench powers to set aside his conviction under section 401 of the SWMA.

C. Issues Presented

Fiore's petition presents two issues:

> 1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.

> 2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

(Pet. for Writ of Habeas Corpus at 5.)

D. Discussion

The first issue that must be addressed by a federal district court when considering a habeas corpus petition filed by a state prisoner is whether the prisoner has exhausted available state court remedies as required by 28 U.S.C. § 2254(b) and (c). Section 2254(b) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the Courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. 28 U.S.C. § 2254(b).

Furthermore, § 2254(c) provides:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c).

A federal district court will not entertain a state prisoner's application for writ of habeas corpus unless

the petitioner has first exhausted the remedies available to him in the state courts. 28 U.S.C. § 2254 (b), (c); *Picard v. Connor,* 404 U.S. 270 (1971). The exhaustion requirement is satisfied when the petitioner has afforded the state's highest court a fair opportunity to address the claim. *Anderson v. Harless,* 459 U.S. 4 (1982). "Fair presentation requires that before a particular claim may be asserted in federal court, the same method of analysis must have been made available to the state courts." *Chaussard v. Fulcomer,* 816 F.2d 925, 928 (3d Cir. 1987), *cert. denied,* 108 S.Ct. 139 (1987) (*quoting Picard v. Connor,* 404 U.S. 270). For a federal court to maintain the petition, *all* constitutional claims contained in the petition must be exhausted; petitions containing both exhausted and unexhausted claims must be dismissed in their entirety. *Rose v. Lundy,* 455 U.S. 509 (1982) (emphasis added).

Here, the record establishes that the issues presented in Fiore's petition for writ of habeas corpus have been repeatedly presented to the Supreme Court either through a direct appeal, a PCRA petition or an Emergency Petition for Extraordinary Relief. Accordingly, Fiore's petition satisfies the threshold exhaustion requirement.

The merits of this matter present uncommon circumstances: two intermediate appellate courts in Pennsylvania applied the same facts to the same statute and reached opposing conclusions. Based upon the opinion of the Court of Common Pleas, the Superior Court concluded that Fiore was properly charged and convicted of operating a waste disposal facility without a permit

under section 606(f) of the SWMA. Conversely, the Commonwealth Court determined that Scarpone, Fiore's codefendant, could not be convicted under section 606(f) because the DER had in fact issued a permit to operate the facility.

Additionally, the Supreme Court was internally inconsistent with its respective rulings. In Fiore's appeal, it summarily affirmed the Superior Court by denying allocatur. However, the Supreme Court granted allocatur to Scarpone. It then affirmed the Commonwealth Court with the following analysis.

> We find that the Commc alth did not make out the crime of operatin waste disposal facility without a permit a Mr. Scarpone under the statute. Simply pu carpone did have a permit. A more appr e charge may have been brought under alternative provisions of the statute, viz., 35 P.S. Sections 6018.606(g) and 6018.601.
>
> . . .
>
> The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 Pa. C.S. Section 1928(b)(1).

Scarpone v. Commonwealth, 535 Pa. 273, 279, 634 A.2d 1109, 1112 (1991). Without comment, the Supreme Court subsequently refused to apply its decision to Fiore through an exercise of its Kings Bench powers.[3]

Fiore's petition for writ of habeas corpus currently before the court for review seeks a retroactive application of the Supreme Court's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993). Generally, civil and criminal cases which are open on direct review must receive the full retroactive effect of a judicial decision decided during the pendency of an appeal. *United States v. McKie*, 73 F.3d 1149, 1152 (D.C. Cir. 1996), *quoting Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). Once a judgment has become final, civil litigants can not seek retroactive application of a judicial decision in a collateral attack. *McKie*, 73 F.3d at 1152. However, a convicted criminal can collaterally attack a final judgment by filing a petition for writ of habeas corpus. *See* 28 U.S.C. § 2254 and § 2255; *See also McKie*, 73 F.3d at 1152.

Retroactive application of a judicial decision pursuant to a petition for writ of habeas corpus is conditioned upon whether the nature of the decision is procedural or substantive. *See United States v. Woods*, 986

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[3] During the PCRA proceedings, the Court of Common Pleas and the Superior Court noted the Supreme Court's failure to provide an explanation for denying Fiore's petitions for extraordinary relief. Neither court determined the underlying reason which supported the Supreme Court's decision to not grant extraordinary relief to Fiore and both speculated that the Supreme Court's actions were taken to finalize Fiore's judgment. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 417, 665 A.2d 1185, 1193 (1995).

F.2d 669, 676 (1993), *cert. denied*, 510 U.S. 825 (1993). In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court determined that new criminal procedural rules should not be given retroactive effect unless: (1) "it places certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe"; and (2) "it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 306 (1989) (citations and internal quotations omitted).

In *Davis v. United States*, 417 U.S. 333 (1984), the United States Supreme Court held that the appropriate inquiry for the retroactive application of a change in the criminal law is whether "the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice and . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis v. United States*, 417 U.S. 333, 346 (1984) (internal citations and quotations omitted).

The Supreme Court's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) did not establish a new rule of criminal procedure. As a consequence, the *Teague* standard does not apply to Fiore's petition. However, in contrast to *Davis*, the Supreme Court also did not fashion a change in the criminal law as was done in *Davis*. Rather, the Supreme Court in *Scarpone* interpreted the SWMA under the facts supporting the

conviction of the defendant; hence, analytically, *Scarpone* essentially represents a statutory construction decision.[4]

In *United States v. Woods*, 986 F.2d 669 (3d Cir. 1993), *cert. denied*, 510 U.S. 826 (1993), the United States Court of Appeals for the Third Circuit (Third Circuit) was presented with an analogous circumstance in which the appellant sought the retroactive application of the United States Supreme Court's opinion in *Hughey v. United States*, 495 U.S. 411 (1990). The Third Circuit recognized that *Hughey* was a statutory construction case which could not be neatly defined as either a case prescribing a new criminal rule or a case announcing a change in the criminal law. *Woods*, 986 F.2d at 672-8. Accordingly, the court fashioned a hybrid standard based upon adherence to the two key principles established in *Teague* and *Davis: viz.*, (1) judicial decisions are retroactively applied only in exceptional circumstances which require substantial justification; (2) retroactive application is appropriate if the failure to provide retroactive relief would result in an egregious injustice. *Id.*, at 678. Based upon these principles the Court of Appeals for the Third Circuit applied a heightened *Davis* standard which required the petitioner to establish more than a miscarriage of justice as in *Davis* but less than the narrow exceptions stated in *Teague*.

At this juncture, *Davis* provides a point for initiating an analysis of the facts in the case *sub judice*. Fiore and his co-defendant were convicted of violating the SWMA. The

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[4] The briefs filed by Fiore and the Commonwealth concur that the *Scarpone* holding was based upon statutory construction. (Br. in Supp. of Writ of Habeas Corpus at 23; Br. in Resp. to Pet. For Writ of Habeas Corpus at 14.)

same facts supported both convictions; however, one intermediate appellate court affirmed Fiore's conviction and another reversed his co-defendant's conviction. The Supreme Court of Pennsylvania agreed with the rationale of the intermediate court which reversed the co-defendant's conviction; *viz.*, that there can be no conviction of operating a waste facility without a permit under sections 401(a) and 606(f) of the SWMA where the DER has, in fact, issued a permit for the operation of the facility. "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 1519 (1994). Accordingly, a conviction under section 606(f) is not valid unless the state satisfactorily establishes that the defendant is operating a waste site without a permit.

Although Fiore had altered the monitoring pipe at his facility, it is without dispute that he possessed a permit for its operation. It is also without dispute that he is currently incarcerated because of the interpretation of a statute which the Supreme Court of Pennsylvania held to be improper. In that regard, although the retroactive application of a statute is an exception to the general rules of finality, under these facts the retroactive application of the Pennsylvania Supreme Court's decision in *Scarpone* weighs heavily in favor of Fiore. *Woods*, 986 F.2d at 681. To find otherwise would result in an egregious injustice because it represents a deprivation of Fiore's liberty interest rights. Summarily, the Supreme Court's

failure to grant relief pursuant to *Scarpone* on the apparent basis of finality served to deny Fiore due process of law and equal protection of the law.

E. Conclusion

Pursuant to 28 U.S.C.A. § 2241(a), a writ of habeas corpus may be granted by a district court within its respective jurisdiction. 28 U.S.C.A. § 2241(a). The writ provides the district court with the power to order an official "to produce the body of a person in custody" and gives the issuing court jurisdiction "to free the person in custody from the restraints imposed upon his liberty if it determines the custody is illegal." *Barry v. Brower*, 864 F.2d 294, 301 (3d Cir. 1988).

The circumstances pertaining to Fiore's incarceration are exceptional because his conviction was affirmed by one intermediate state appellate court and his co-defendant's conviction was reversed by a different intermediate state appellate court. Fiore's situation is also unusual because he remained incarcerated while the affirmation of the Supreme Court of Pennsylvania set aside the conviction of his co-defendant. Therefore, under the Supreme Court of Pennsylvania's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), Fiore is currently incarcerated for actions that did not constitute a violation of the section of the SWMA with which he was charged by the Commonwealth of Pennsylvania. Relatedly, the refusal by the Supreme Court of Pennsylvania to apply its decision to Fiore has resulted in an unjustified deprivation of his liberty interests. Fiore's petition for writ of

habeas corpus seeks retroactive application of the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2 1109 (1993).

Accordingly, it is recommended that Fiore's petition for writ of habeas corpus be granted because his incarceration is in violation of his right to due process of law and equal protection of the law under the Fourteenth Amendment of the United States Constitution. It is further recommended that the grant of the writ should be accomplished through the retroactive application of the Supreme Court of Pennsylvania's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993). Finally, it is recommended that upon the retroactive application of *Scarpone* that Fiore be released from the portion of his incarceration which pertains to the consecutive sentences imposed for the jury and the non-jury trial convictions under section 401(a) and 606(f) of the SWMA. However, he should be released from incarceration only if he is now not subject to any other legally imposed sentence.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, objections to this report and recommendation are due by March 15, 1997. Responses to objections are due by March 25, 1997.

/s/ Francis X. Caiazza
Francis X. Caiazza
U. S. Magistrate Judge

February 27, 1997
Dated

cc:

U.S. District Judge

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 87 C 8978 (85 CR 284)
V.	)	Hon. Paul E. Plunkett
LEE G. LOVETT	)	

MEMORANDUM OPINION AND ORDER

After a jury trial in federal court, Petitioner Lee Lovett was convicted on two counts of mail fraud and sentenced to three months in prison and five years probation. Lovett's conviction was affirmed on appeal. Lovett, who has served his prison sentence but is still on probation, now moves pursuant to 28 U.S.C. 2255 to vacate his conviction and sentence. He asserts that the conviction must be vacated as a result of the Supreme Court's decision in *McNally v. United States*, 107 S.Ct. 2875 (1987), which repudiated the "intangible rights" theory of mail fraud. For the reasons set forth below, we agree with Petitioner, and therefore vacate his conviction and sentence.

Background

In 1980, Lovett was a partner in a Washington, D.C. law firm specializing in communications law. His firm was retained by U.S. Cable Corporation to assist the company in obtaining the cable television franchise for Fox Lake, Illinois. Lovett was indicted on April 29, 1985,

for alleged criminal violations arising from his efforts on behalf of U.S. Cable. He was charged, in essence, with bribing Richard Hamm, the Mayor of Fox Lake, in an effort to ensure that U.S. Cable was awarded the franchise. Count I charged Lovett with conspiring to violate the Travel Act by travelling in interstate commerce to promote bribery under the laws of the state of Illinois. Counts II, III, and IV alleged substantive violations of the Travel Act involving the promotion of bribery. Lovett was also charged, in Counts V and VI, with mail fraud.

The mail fraud counts alleged that Lovett schemed to defraud the Village of its right to the faithful services of Mayor Hamm, its right to have the Village's business conducted free from conflicts of interest and fraud, and its right to make the franchise award with full disclosure of ownership interest; and that he schemed to obtain the cable franchise by means of fraudulent representations.

At the trial before Judge Getsendanner, the main prosecution witness was Mayor Hamm, who had already pled guilty to a crime in connection with the award of the cable franchise. Hamm testified that Lovett had offered him a 5% interest in the local subsidiary of U.S. Cable in return for Hamm's assistance in obtaining the franchise for U.S. Cable. He further testified that he told Lovett that he could not hold the interest in his own name, and that Lovett then suggested placing the interest in the name of a nominee. Lovett, on the other hand, testified that he had not offered Hamm a 5% interest in the company, but rather had only offered him the opportunity to select a local partner to hold a 5% interest. The jury acquitted Lovett on Counts I through IV, the bribery counts, but convicted him of mail fraud on Counts V and VI.

Discussion

Lovett argues that his conviction must be vacated because he was convicted under the "intangible rights" theory of mail fraud, a theory which was recently repudiated by the Supreme Court in *McNally v. United States*, 107 S.Ct. 2875 (1987). Before discussing the merits of Lovett's arguments, we must first address a number of procedural issues.

I.

A. The Availability of Section 2255

In order to seek relief under Section 2255, the Petitioner must be "in custody" for purposes of that provision. Lovett has already completed his prison sentence, but he is still on probation. A person on probation is "in custody" for purposes of a section 2255 motion. *See United States v. Re*, 362 F.2d 641, 643 (2d Cir. 1967). Thus, Lovett clearly meets the custody requirement.[1]

B. Procedural Default

We must also consider the government's argument that Petitioner waived the right to challenge the intangible rights theory by failing to object at trial and on appeal to the government's use of this theory. Despite Petitioner's assertion to the contrary, it appears clear to

---

[1] We also note that the error alleged need not be a constitutional one in order to be subject to collateral attack under Section 2255. *See Davis v. United States*, 417 U.S. 333, 345 (1974); *Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975).

us that he never challenged the validity of the theory – whether by way of pre-trial motion, objection to the relevant jury instructions, post-trial motion, or direct appeal. Instead, he merely argued (in his post-trial motion and on appeal) that there was no criminal fraud because no evidence had been presented which established that Mayor Hamm had actually failed to carry out his duties and responsibilities as the mayor of Fox Lake. *See* Memorandum of Points and Authorities in Support of Motion for Judgment of Acquittal or, in the Alternative, for a New Trial; *United States v. Lovett*, 811 F.2d 979, 984-85 (7th Cir. 1987).

Because of Lovett's previous failure to challenge the intangible rights theory, we may not consider his claim on collateral attack unless he shows both " 'cause' excusing his double procedural default, and 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168 (1982). As to cause, we ruled in *Moore v. United States*, 87 C 8542 (slip op. Jan. 14, 1988), another post-*McNally* petition to vacate an intangible rights theory mail fraud conviction, that petitioner indeed had cause not to object to use of the intangible rights theory. We relied in *Moore* on *Reed v. Ross*, 468 U.S. 1 (1984), where the Supreme Court held that the cause requirement is satisfied when existing law did not afford petitioner a "reasonable basis" for the claim at issue at the time of trial and appeal. *McNally*'s repudiation of the intangible rights theory was such a clear break with the past, we held, that a head-on attack on the intangible rights theory was not a claim reasonably available to counsel at the time of petitioner's trial and appeal. The government has brought to our attention Judge Shadur's

ruling to the contrary in a similar case. *See United States v. Gill*, 84 CR 20020 (slip op. Nov. 3, 1987). However, as we explain below, we remain convinced that adequate cause existed for the failure of one in Lovett's position to challenge the intangible rights theory at trial and on appeal.

In *Reed*, the court reasoned that

> Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a . . . procedural bar, just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. . . . Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose.

468 U.S. at 15. The Court therefore went on to hold that cause is present where existing law does not offer a reasonable basis for a particular challenge. More specifically, it indicated that cause will nearly always exist where a decision of the Court "overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* at 17 (citation omitted).

We think the existence of cause is clear under the *Reed* standard. Prior to *McNally*, the intangible rights theory was well-entrenched in the Seventh Circuit; the court had explicitly approved its use on numerous occasions. *See* discussion in *Moore*, slip op. at 3. Moreover, the

theory had also been approved by every other circuit which considered it. *See McNally*, 107 S. Ct. 2882-84 and n.1-3 (Stevens, J., dissenting). As the First Circuit noted in *United States v. Ochs*, (slip op. Mar. 15, 1988): "The Supreme Court's decision in *McNally* has been variously described as 'blockbusting,' as 'a total surprise' and as a 'wholly unexpected explication of the law of mail fraud.' It was, without a doubt, a departure from the law of every court of appeals . . . to consider the issue of intangible rights mail fraud prosecutions." *Id.* at 15 (citations omitted) Under these circumstances, we simply cannot say that Lovett's counsel had a reasonable basis in existing law for raising such a challenge.

Unlike Judge Shadur, we do not believe that the Supreme Court's decision in *Smith v. Murray*, 106 S.Ct. 2661 (1986), requires a holding of insufficient cause. Judge Shadur construes *Smith* as holding that "[n]o claim can be said to be 'unavailable' . . . where that claim had previously been made in the lower courts." *Gill*, slip op. at 9. We disagree with this interpretation. In *Smith*, the Court noted that "various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal." 106 S.Ct. at 2667. Where the intangible rights theory was concerned, it appears to us that no "percolation" was going on; instead, it was simply becoming increasingly evident that no appellate court (least of all the Seventh Circuit) was willing to entertain a frontal assault on the intangible rights theory.[2]

---

[2] Neither do we believe that the Court's language in *Engle v. Isaac*, 456 U.S. 107, 130 (1982) mandates a finding of insufficient cause in this case. *Engle's* statement to the effect that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial" does give us some pause. However, we believe that the rationale so carefully set forth in the Court's subsequent *Reed* decision strongly supports a finding of cause in this case, and we cannot find that this rationale is overridden by the brief discussion in *Engle*.

In the end, we are brought back to the rationale of *Reed*, and most particularly, to the reasoning of the fourth Circuit's Judge Haynsworth as quoted approvingly by the Court:

> "If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable . . . claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable."

Reed, 468 U.S. at 16. We wholeheartedly agree with these sentiments (which of course apply as aptly to trial as to appellate litigation), and we find that under *Reed* Lovett had sufficient cause for his previous failure to challenge the intangible rights theory.

The prejudice prong of the cause and prejudice test may be dispensed with much more quickly. As we stated in *Moore*, "If [petitioner] succeeds in establishing that the acts which the jury found he committed do not constitute

a federal crime, he has suffered great prejudice. . . . [T]o be convicted and sentenced by a federal court for acts which are not a federal crime seems to us to be the essence of prejudice." *Moore*, slip op. at 3-4.[3] Thus, we find that Lovett has met the cause and prejudice test, and now move on to the last of the threshold barriers – the issue of retroactivity.

C. Retroactivity

Before considering Petitioner's argument that *McNally v. United States* requires vacating his conviction, we must of course step back and consider whether *McNally* applies retroactively to convictions already final. We are convinced that it does so apply. As Judge Smalkin pointed out in *United States v. Mandel*, 672 F. Supp. 864, 874-75 (D. Md. 1987):

> There is persuasive authority to the effect that a Supreme Court decision construing the mail fraud statute as not reaching a particular scheme to defraud is fully retroactive. *See Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975) (habeas corpus); *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974) (writ of error *coram nobis*). The backdrop to these cases was the Supreme Court's decision in *United States v. Maze*, 414 U.S. 395 (1974), that Section 1341, the mail fraud statute, does not reach certain credit card schemes to defraud. The courts deciding

[3] Indeed, even had we found Lovett to be in procedural default (through failure to establish cause), we most likely would have allowed his collateral attack notwithstanding the default, in order to avoid a fundamental miscarriage of justice.

> both the *Strauss and Travers* cases permitted collateral attack on pre-*Maze* mail fraud convictions in light of *Maze*. They explained, quite simply, that 'Section 1341 [the mail fraud statue] has always had the meaning given it by the Supreme Court in *Maze*.' "

Similarly, the mail fraud statute has always had the meaning given it by the Court in *McNally*. Thus, *McNally* applies retroactively and we may now weigh the merits of Petitioner's argument that his conviction must be vacated in light of *McNally*.

II.

A. *McNally*

In *McNally*, the Supreme Court considered the scope of the mail fraud statute, 18 U.S.C. 1341, which prohibits the use of the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." It held that the mail fraud statute applies only to schemes to defraud others of money or property rights; it does not proscribe schemes to defraud citizens of an intangible right to honest and impartial government. Petitioners in *McNally* had been charged with devising a scheme to defraud the citizens of Kentucky of their intangible right to have the state's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. The jury was instructed that it could convict if it found either of two schemes to exist. One scheme involved a deprivation of property rights, but the other involved only the deprivation of the intangible right to good government. The Court reversed

petitioners' convictions because the jury had not been required to find that the state was defrauded of any money or property in order to convict. Reversal was necessitated because the jury instruction permitted a conviction for conduct (deprivation of the right to good government) not within the scope of Section 1341.

B. The Effect of McNally on Lovett's Conviction

Lovett's indictment contained both an intangible rights prong and a property prong. It alleged that Lovett devised and intended to devise and participate in a scheme to defraud.

> (a) the Village of Fox Lake and its citizens of their right to the legal, faithful and honest services of Richard Hamm in the performance of acts related to his public employment;
>
> (b) the Village of Fox Lake and its citizens, public officials and its public employees of the right to have the business of the Village of Fox Lake conducted honestly, fairly and impartially, free from collusion, partiality, dishonest, conflicts of interests, and fraud;
>
> (c) the Village of Fox Lake and its citizens, its public officials and its public employees of the right to make a cable television franchise award with full disclosure of ownership interests;
>
> and to obtain the Village of Fox Lake cable television franchise contract by means of false and fraudulent representation and promises, knowing them to be false when made, . . .

The jury was instructed that

> A scheme means some plan or course of action intended to deceive another and to deprive another of something of value by means of false pretenses, representations, or promises.
>
> A scheme to defraud under the mail fraud statute may include a plan to deprive citizens of the honest and impartial functioning of a public office, and this is "something of value" within the meaning of the mail fraud statute.
>
> . . . [I]t is not necessary that the government prove all of the false pretenses, representations, promises and acts charged in the portion of the indictment describing the scheme, [but] it is essential that one or more of them be proved beyond a reasonable doubt establishing the existence of the scheme to defraud, . . . [and] you must unanimously agree upon which one or more of them has been proven.
>
> * * *
>
> The phrase "intent to defraud" means that the acts charged were done knowingly and with the intent to take financial advantage of a confidential relationship, or to deceive Fox Lake and its citizens in order to cause the loss of their right to the loyal, faithful and honest services of Mayor Richard Hamm in the performance of his official duties, or in order to cause the loss of the honest, fair and impartial conduct of business of the office of mayor or village.

The instructions presented the theories outlined in the indictment in the alternative (i.e., using the word "or"); the jury was told that it could convict Lovett as long as it agreed upon any one of them. As in *McNally*,

then, the jury was not required to find that the citizenry was defrauded of any money or property. Thus, the instructions allowed the jury to convict for conduct that is outside the scope of the mail fraud statute, and the conviction must therefore be vacated. *McNally*, 107 S.Ct. at 2882; *see also United States v. Gimbel*, 830 F.2d 621, 627 (7th Cir. 1987); *United States v. Ochs*, (1st Cir.) (slip op. Mar. 15, 1988); *United States v. Mandel*, 672 F. Supp. 864 (D. Md. 1987); *United States v. Slay*, (E.D. Mo.) (slip op. Nov. 4, 1987).

Contrary to the government's assertion, this case does not fall within the role of *United States v. Wellman*, 830 F.2d 1453 (7th Cir. 1987), where the Seventh Circuit refused to overturn a mail fraud conviction on *McNally* grounds. In *Wellman*, defendant was charged with using the mail to sell chemical transportation tanks based on misrepresentations that they met government specifications. The scheme was characterized as one to defraud the buyer of "its right to have safe and authorized equipment for the storage and shipment of hazardous chemicals and of its right to know that equipment it purchased was in full compliance with [government] regulations," and to "obtain[ ] money by means of false and fraudulent pretenses, representations and promises." The Seventh Circuit found that the jury could not have convicted for conduct outside the statute's reach, for "the government could not logically prove one scheme without proving the other since the elements of the two were identical." 830 F.2d at 1463.

The government argues that this case is analogous to *Wellman*. Indeed, it goes so far as to argue that

> Like the conduct charged and proved in *Wellman*, "far from involving intangible rights, this case presents a typical garden variety fraud perpetrated against [the victims] in part through use of the United States mail. Such conduct was precisely what Congress intended to proscribe."

Government's Response at 5, quoting *Wellman*, 830 F.2d at 1463.

It seems to us that this argument can only be characterized as disingenuous. Both the district court and the court of appeals explicitly noted that the mail fraud counts were tried to jury on an intangible rights theory – i.e., the theory that the defendant intended to deprive the citizens of Fox Lake of their rights to good government and to the honest services of public officials. *See* Memorandum Opinion and Order of October 28, 1985 at 2; *United States v. Lovett*, 811 F.2d 979, 984 (7th Cir. 1987). Indeed, the government argued to the jury that it should convict Lovett even if it believed his testimony that he only offered Mayor Hamm the right to choose the holder of the 5% interest – on the theory that such conduct created a conflict of interest for the mayor and thereby deprived the citizens of Fox Lake of their right to good government, i.e., government free of conflicts of interest. *See* Transcript of August 8, 1985 at 34, 88, 102. This case is thus totally unlike *Wellman*, in which defendant was in essence charged with bilking a buyer of chemical storage tanks out of his money by falsely claiming that the tanks complied with government regulations. The Lovett jury might well have found that Lovett schemed to defraud the citizens of Fox Lake of their right to good government

(e.g., by placing the mayor in a conflict of interest) without finding that he deprived the citizens of any sort of property rights. Thus, Lovett may have been convicted for conduct outside the scope of the mail fraud statute, and his conviction cannot stand.

Conclusion

For the foregoing reasons, Petitioner's motion to vacate his conviction and sentence is granted.

ENTER:

/s/ Paul E. Plunkett
Honorable Paul E. Plunkett
District Court Judge

Dated: May 16, 1988

Supreme Court, U.S.
FILED
FEB 1999
CLERK

No. 98-942

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

WILLIAM FIORE
Petitioner

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA
Respondents

On Petition For Writ of Certiorari To The United States Courts Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Constitution compels the retroactive application of a state court criminal decision based on the construction of a state statute, so as to vacate a properly obtained state court conviction, made final long before the decision whose retroactive application is sought?

II. Whether this Court should consider the merits of a petition for certiorari where the Court of Appeals did not resolve the question of whether Petitioner had exhausted his claim or whether the state courts had adjudicated his claim on the merits?

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Gregory White, Warden of the State Correctional Institution at Pittsburgh, and The Attorney General of the Commonwealth of Pennsylvania, respectfully request this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, seeking review of the reversal of a writ of habeas corpus to William Fiore, a state prisoner in custody in Pennsylvania.

STATEMENT OF THE CASE

William Fiore and his co-defendant and former employee, Dave Scarpone, were convicted in 1986 of a violation of the provision of the Pennsylvania Solid Waste Management Act which requires that a proper permit be obtained for the storage, treatment, transportation and disposal

criminal cases. Scarpone took his appeal to the Pennsylvania Commonwealth Court, an intermediate appellate court with jurisdiction to hear appeals from criminal actions arising from the violation of regulatory statutes administered by a Commonwealth agency.

Each litigant obtained a different result. Fiore's judgment of sentence was affirmed by Superior Court based on the opinion of the trial court. The Pennsylvania Supreme Court denied Fiore's petition for discretionary review and Fiore's conviction became final on direct appeal. More than a year after Fiore had exhausted his direct appeal, Commonwealth Court reversed Scarpone's conviction. The Pennsylvania Supreme Court granted the Commonwealth's petition for allowance of appeal and affirmed the reversal. The Supreme Court held, that as a matter of statutory construction, "[T]he statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection." *Commonwealth v. Scarpone*, 535 Pa. 273, 279, 634 A. 2d 1109,1112 (1993). The decision stood silent as to its retroactive application.

Fiore made two unsuccessful attempts in state court to obtain extraordinary review of his already exhausted direct appeal. While Scarpone's appeal was pending before the Pennsylvania Supreme Court, Fiore filed an Application for Emergency Relief, asking the Court to consider the merits of his conviction when the Court considered *Scarpone*. To accomplish this, Fiore asked the Pennsylvania Supreme Court to exercise its King's Bench powers, 42 Pa. Cons. Stat. Ann. §726 (West 1981), which permit the Court to take jurisdiction of any matter pending before any court of the Commonwealth and "enter a final order or otherwise cause right and justice to be done." When Fiore requested this extraordinary remedy, he had no matter pending before any court in the Commonwealth. The application was denied without comment.

Fiore filed a second Application for Emergency Relief after the Pennsylvania Supreme Court upheld the reversal of Scarpone's conviction. Although Fiore had no matter pending before any court in the Commonwealth, he again asked the Pennsylvania Supreme Court to invokes its King's Bench powers and give him the retroactive application of *Commonwealth v. Scarpone,* 535 Pa. 273, 634 A.2d 1109 (1993).This application was denied without comment.

Fiore then sought to vacate his conviction through the mechanism of post conviction relief, once again requesting retroactive application of *Scarpone*. The trial court denied relief. The Superior Court affirmed the denial in a written opinion which explained Pennsylvania's law with respect to retroactive application of new appellate court rulings to cases on collateral review. The Pennsylvania Supreme Court denied Fiore's petition for allowance of appeal.

Finally, Fiore sought a writ of habeas corpus from the district court, asserting that he was in custody for conduct which the Pennsylvania Supreme Court had determined did not constitute a crime and that the Pennsylvania courts had denied him due process and equal protection of law by refusing to grant him the benefit of the Pennsylvania Supreme Court decision in *Scarpone*. The United States District Court for the Western District of Pennsylvania held that Fiore should obtain relief through the retroactive application of *Scarpone* and granted a writ of habeas corpus. Respondents, through the Pennsylvania Office of Attorney General, appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals found that neither the Due Process Clause nor the Equal Protection Clause mandates the retroactive application of *Scarpone* and reversed the district court's grant of a writ of habeas corpus

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court Of Appeals Properly Considered And Rejected Petitioner's Due Process Clause Claim.

Fiore is himself in error when he contends that the Court of Appeals "erred in framing its analysis of petitioner's due process claim as simply a request that petitioner be afforded retroactive application of the Pennsylvania Supreme Court's decision in *Commonwealth.v.Scarpone*, 535 Pa. 273, 634 A. 2d 1109 (1993)." Pet. 11. Fiore characterizes his "due process claim . . . [as] a straightforward contention that the trial court had no authority to punish him because the uncontradicted evidence of record does not establish each essential element of the crime upon which he is convicted." Pet. 11-12.

Fiore sought a writ of habeas corpus on the allegations that (1) he was in custody for conduct which the Pennsylvania Supreme Court had determined was not a crime and (2) that the Pennsylvania courts had denied him due process and equal protection of law by refusing to grant him the benefit of the Supreme Court decision in *Scarpone*. Petition for Writ of Habeas Corpus, Paragraph 12(a), p. 3. The first claim implicitly references *Scarpone* ("in custody for conduct which the Pennsylvania Supreme Court had determined was not a crime"). The second claim explicitly references *Scarpone*.

As Fiore styled his claims in the district court, the matter plainly was a request for the retroactive application of *Scarpone*. The United States District Court for the Western District of Pennsylvania recast Fiore's first claim as one grounded solely in a claim of insufficient evidence. App. A-6, citing Report of Magistrate Judge at 11-12. By so doing, the

District Court erroneously removed the issue of the retroactive application of *Scarpone* which Fiore himself raised.

Despite the error of the Magistrate Judge in recasting Fiore's first claim for relief, the Court of Appeals did not err in its analysis. The Court of Appeals observed that Fiore based his eligibility for federal habeas relief on the claim that he had been denied due process of law, by authority of *In Re Winship*, 397 U.S. 358 (1970)(Due Process Clause requires proof beyond reasonable doubt of every fact necessary to constitute crime charged). The Court of Appeals rejected Fiore's due process claim.

> Fiore's argument would have force had *Scarpone* been the law in Pennsylvania at the time of his conviction. However, *Scarpone* was decided after Fiore's conviction became final, and the Pennsylvania courts refused to apply the decision in Fiore's case based on state retroactivity principles. *See Commonwealth v. Fiore*, 665 A. 2d 1185, 1193 (Pa. Super. Ct. 1995) Since "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), Fiore is entitled to relief only if federal law requires retroactive application of *Scarpone*.

App.A-7 through A-8. Plainly, the Court of Appeals considered Fiore's Due Process Clause claim, and rejected it. Such a result does not merit consideration by this Court.

It should also be noted that Fiore simplifies, and thus misstates, the Commonwealth's theory of prosecution, *viz.* "The Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times." Pet. 13, citing to App. A-3,

It should also be noted that Fiore simplifies, and thus misstates, the Commonwealth's theory of prosecution, *viz.* "The Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times." Pet. 13, citing to App. A-3, App. E-2 through E-4. The Court of Appeals properly stated the prosecution's theory: "Although the state did not dispute the fact that Fiore had obtained a permit from the DER. . .the state proceeded on the theory that Fiore and Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation." App. A-3

II. The Federal Constitution Does Not Require That Pennsylvania Give Retroactive Application To A State Court Criminal Decision Construing State Law.

At its core, the instant petition for a writ of certiorari seeks to compel the retroactive application of a state court decision, grounded in state criminal law and state principles of statutory construction, so as to vacate a properly obtained state court conviction, also grounded in state law, and made final long before the decision whose retroactive application is sought. No provision of the federal constitution requires such a result.

Controlling law is plain. The grant of a writ of habeas corpus obtains only when there has been a violation of the Constitution, laws or treaties of the United States. 28 U.S.C.A §2254(a)(West 1994)."[T]he federal constitution has no voice upon the subject" of retroactivity. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358,364 (1932).*See Linkletter v. Walker*, 381 U.S. 618 (1965); *Solem v. Stumes*,

decisions of its highest court, though later overruled, are law none the less for intermediate transactions." *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358,364 (1932)

In arguing for the retroactive application of *Scarpone*, Fiore presents no question of constitutional dimension. Accordingly, there are no grounds to grant the petition.

III. Unresolved Issues Of Exhaustion And The Limited Scope Of Relief Sought Render This Petition Unsuitable For Consideration By The Court.

The Court of Appeals noted that Fiore is subject to the additional requirements of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §104, 110 Stat. 1214, 1218-19. The Court of Appeals was certain that Fiore could not succeed on the merits, and so wrote, "we need not decide whether Fiore exhausted his claim, *id.* §104(b), or whether the state courts adjudicated his claim on the merits. *id.* at §104(d)." App. A-7, n.3

"An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies." 28 U.S.C. §2254(b)(2)(1998). A writ of habeas corpus may not obtain on behalf of a state prisoner unless the applicant has exhausted available state remedies. 28 U.S. C. §2254(b)(1)(A) (1998).

The Commonwealth has not waived the issue of exhaustion, having raised the issue in both the District Court and the Court of Appeals. With the question of exhaustion of remedies left unresolved, review of the merits of the case would be improvident.

Finally, the petition is unsuitable for consideration on the merits because a resolution in favor of the Petitioner would

and the Court of Appeals. With the question of exhaustion of remedies left unresolved, review of the merits of the case would be improvident.

Finally, the petition is unsuitable for consideration on the merits because a resolution in favor of the Petitioner would have no broad ramifications. The Commonwealth is now bound to follow the law of *Scarpone*. The relief sought would affect only the petitioner.

CONCLUSION

William Fiore is not, as he asserts, "an indisputedly innocent man. . . incarcerated for a crime the Commonwealth effectively concedes it could not prove." He stands convicted under a theory of prosecution affirmed on direct appeal. The Commonwealth is under no constitutional obligation to grant retroactive application of a decision grounded in state criminal law and principles of statutory construction.

Respondents request this Honorable Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, both because the Court of Appeals properly reversed the grant of a writ of habeas corpus

and because the underlying case presents unresolved issues of exhaustion of state remedies.

Respectfully submitted

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Supreme Court, U.S.
FILED
MAY 11 1999
CLERK

No. 98-942

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

v. *Petitioner,*

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 168

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Certiorari Granted March 29, 1999

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6/28/96	1	PETITION for writ of habeas corpus. [Entry date 07/01/96]
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6/28/96	3	APPENDIX to [2-1] support brief by WILLIAM FIORE [Entry date 07/01/96]
		• • •
7/2/96	–	CASE REFERRED to Magistrate Judge Francis X. Caiazza.
		• • •
8/6/96	9	ANSWER to Writ of Habeas Corpus by GREGORY WHITE, ATTORNEY GENERAL PA
8/6/96	10	EXHIBITS by GREGORY WHITE, ATTORNEY GENERAL PA in support of [9-1] answer writ by ATTORNEY GENERAL PA, GREGORY WHITE A-N (Copies of State Court Records)
8/21/96	11	RESPONSE by WILLIAM FIORE to [9-1] answer writ by ATTORNEY GENERAL PA, GREGORY WHITE
2/27/97	12	REPORT AND RECOMMENDATION of Magistrate Judge Francis X. Caiazza signed on 2/27/97 Recommending that [1-1] petition be granted; The parties have 10 days from the date of service to file

objections to this Report and Recommendation.

3/14/97 13 OBJECTION by GREGORY WHITE, ATTORNEY GENERAL PA to [12-1] report and recommendations

3/24/97 14 RESPONSE by WILLIAM FIORE to [13-1] objection by ATTORNEY GENERAL PA, GREGORY WHITE

4/24/97 15 ORDER, dated 4/21/97 that the Petition for Writ of Habeas Corpus by the Petitioner is Granted and the Respondents shall release the petitioner from the Portion of his incarceration which pertains to the consecutive sentences imposed for the Jury and the non jury trial convictions adopting [12-1] report and recommendations (signed by Judge Gary L. Lancaster on 4/24/97) [Entry date 04/25/97]

4/24/97 – Case closed. Notices mailed. [Entry date 04/25/97]

5/20/97 17 NOTICE OF APPEAL by GREGORY WHITE from [15-1] order dated 4/14/97

* * *

10/6/98 29 Certified copy of JUDGMENT dated 10/1/98 issued in lieu of a formal mandate received from USCA re: [17-1] appeal by GREGORY WHITE, WILLIAM FIORE that the Judgment of the District Court entered April 25 1997 be and the same is hereby Reversed, Costs taxed against Appellee, in accordance with the

opinion of this Court. [Entry date 10/07/98]

* * *

10/7/98 – Case reopened

12/8/98 30 ORDER entered the Judgment of this court has been reversed by the US Court of Appeals for the Third Circuit by Judgment entered on 7/21/98 the habeas corpus petition filed by William Fiore is Dismissed and the Clerk of court is directed to mark this case Closed. (signed by Judge Gary L. Lancaster on)

12/8/98 – Case closed, Case Closed.

Third Circuit Court of Appeals

5/29/97 CIVIL CASE DOCKETED. Notice filed by Gregory White, Atty Gen Comm of PA.

* * *

7/7/97 BRIEF on behalf of Appellants Gregory White, Atty Gen, Certificate of service date 7/7/97.

7/7/97 APPENDIX on behalf of Appellants Gregory White, Atty Gen, Certificate of service date 7/7/97.

* * *

7/15/97 ADDENDUM to appellants' appendix containing D.C. docket entries.

* * *

8/5/97 BRIEF on behalf of Appellee William Fiore. Certificate of Service date 8/5/97.

8/5/97	SUPPLEMENTAL APPENDIX on behalf of William Fiore. Certificate of service date 8/5/97.
	* * *
8/26/97	SECOND SUPPLEMENTAL RECORD filed.
	* * *
7/21/98	PUBLISHED OPINION (Stapleton, Alito, Authoring Judge, Shadur*, District Judge, *Sitting by designation), filed.
7/21/98	JUDGMENT Reversing. Costs taxed against appellee, filed.
8/4/98	PETITION by Appellee for rehearing in banc. Certificate of service dated 8/3/98, filed.
9/23/98	ORDER (Becker, Chief Judge, Sloviter, Stapleton, Greenberg, Scirica, Authoring Judge, Cowen, Nygaard, Alito, Roth, McKaee, Rendell, Circuit Judges, Shadur*, District Judge *Voted as to panel rehearing only) denying petition for in banc rehearing by Appellee William Fiore, filed.
9/25/98	REPORTER at 149 F.3d: 221
10/1/98	MANDATE ISSUED, filed.
12/14/98	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by dkt-97-3288, Appellant Atty Gen. Filed in the Supreme Court on 12/9/98 at Supreme Ct. case number: 98-942.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
vs.	:	
WILLIAM FIORE,	:	CC No. 8508740
Defendant.	:	

OPINION

Filed by the HONORABLE
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January 19, 1988

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
vs.	:	
WILLIAM FIORE,	:	CC No. 8508740
Defendant.	:	

OPINION

NOVAK, J. January 19, 1988

The defendant, William Fiore, was originally charged with 161 violations of the Solid Waste Management Act and other attendant statutes. Early in pre-trial proceedings, the parties agreed that only those charges which also involved Fiore's co-defendant, David Scarpone, would be tried in one trial and that the remaining charges, much greater in number, which did not involve his co-defendant would be tried in a second trial. This opinion deals with the verdict and sentence in each of those trials.

The defendant was found guilty by a jury on February 18, 1986, of the following charges: Disposing of Hazardous Wastes and Operating a Hazardous Waste Facility Without a Permit (two counts), 35 P.S. §6018.401(a); Discharging Industrial Wastes Without a Permit, 35 P.S. §691.301, 307; Disposing of Residual Wastes and Operating a Residual Waste Facility Contrary to his Permit, 35 P.S. §6018.302(a); Perjury, 18 Pa.C.S. §4902; Obstruction of Administration of the Law, 18 Pa.C.S. 5101; and Criminal Conspiracy, 18 Pa.C.S. §903.

In addition, the defendant was found guilty in a non-jury trial on July 2, 1986, of the following charges: Discharging Industrial Wastes Without a Permit, 35 P.S. §691.301, 307; Disposing of Hazardous Wastes and Operating a Hazardous Waste Disposal Facility Without a Permit, 35 P.S. §6018.401(a); Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit (45 counts), 35 P.S. §6018.302(a); Using his Property and the Property of Another as a Solid Waste Disposal Area Without a Permit (two counts), 35 P.S. §6018.501(a); and Disposing of Residual Wastes and Operating a Residual Waste Facility Without a Permit (four counts), 35 P.S. §6018.301.

After the denial of lengthy post-trial motions, the defendant was sentenced on April 10, 1987. The defendant was convicted of sixty counts of violating criminal sanctions of the Solid Waste Management Act and other criminal statutes. We sentenced the defendant on only three of these counts. At Count 1 (Trial 1) (original Count 5), we sentenced the defendant to a period of incarceration of two and one-half to five years and ten years probation. The gravamen of this Count was the deliberate alteration of the groundwater monitoring system which risked the seepage of hazardous wastes into the aquifer. At Count 5 (Trial 1) (original Count 10), lying under oath before the Commonwealth Court, we sentenced the defendant to a consecutive period of incarceration of one to two years and five years probation. At Count 2 (Trial 2) (original Count 2), we sentenced the defendant to a further consecutive period of incarceration of two and one-half to five years and ten years probation. The gravamen

of this Count was the above-gound pumping of hazardous wastes into an unnamed tributary of the Youghiogheny River. The total sentence imposed was a period of incarceration of six to twelve years. In addition, we ordered the defendant to pay the following fines: $100,000 at Count 1 (Trial 1), and $100,000 at Count 2 (Trial 2). A Motion to Modify Sentence was timely filed and denied.

Facts

Trial One (Jury)

The defendant was the owner and operator of a very successful business known as the Municipal and Industrial Disposal Company (MIDC) which is located in Elizabeth Township, Allegheny County. In 1979, he received a permit to dispose of various wastes including hazardous wastes.

In order to properly understand the issues in this case, we believe that a review of the regulation process would be helpful. For each type of waste or "waste stream" which the defendant intended to receive at his site, he was required to submit a "module" to the Department of Environmental Resources (DER) for approval. Known as a "Module 1," this form indicates the type of waste, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed. This information is certified by an engineer employed by the landfill operator. The DER then reviews the proposal to determine whether the particular waste stream is compatible with (1) other waste deposited on that site, and (2) the site liner.

Additionally, the DER considers whether any leachate generated by a particular waste stream is compatible with the end treatment facility. Leachate is another term of art meaning the contaminant generated from either rain, surface or groundwater moving through already deposited waste.

Upon receipt of a module, the DER's technical staff reviews it. In certain instances, the module may be submitted to outside agencies for their review as well. Based upon this analysis, the DER will then either approve or reject the module. If rejected, the landfill operator may not deposit this particular waste at his facility.

Often, the modules do not contain sufficient data to be properly reviewed. They are then returned to the landfill operator for amendment. Modules are often submitted, returned, re-submitted, returned again, re-submitted yet again before they are ready to be reviewed by the DER staff for final disposition. Once accepted for final review by the DER, the review process could take anywhere from a few weeks to several months. With this background, we now turn to the specific facts in this case.

The defendant's disposal facility contained, *inter alia*, a Phase I disposal pit, a temporary disposal pit, and a demolition site. The defendant was licensed to receive certain streams of hazardous wastes and deposit them in the temporary pit and later the Phase I pit. The pit was lined with natural clay which had been found to be sufficient to contain the wastes and keep them from seeping into the aquifer. After the pit was full, it was eventually to be closed and covered in order to return the site to

its natural condition. In order to be sure that the hazardous wastes were not seeping into the environment, various monitoring systems were established.

Running under the Phase I pit is an under-drain which was identified as pipe 810. This under-drain converges with the 711 pipe in a manhole near the pit and emits a single discharge. The purpose of the under-drain, according to Dan Peterson, an operations supervisor in the DER, Pittsburgh Region of the Bureau of Solid Waste Management, was to "convey[ ] mine water beneath the disposal pit carrying it away from the liner. In addition, it was designated in the permit as a monitoring point . . . to check on the integrity of the liner. If the liner would fail, materials seeping out of the pit through the liner would appear in the under-drain (N.T. 2/4/86, pp. 79-83).

In late 1982 and early to mid 1983, Mr. Peterson, during routine inspection visits, detected a "strong organic odor coming from the manhole." He described this odor as "very similar to the type of odor that you get when you're around a disposal pit. Also, it's similar to odors you get at U.S. Steel coke-making facility." (N.T. 2/4/86, p. 96-97). Numerous samples of the discharge from the 711 and 810 pipes were collected by the DER and tested at their laboratory in Harrisburg. The samples tested positive for the presence of organic chemical (i.e., Benzene, Toluene and Xylene) (N.T. 2/4/86, pp. 202-205, 381-382, 528-530; Commonwealth Exhibits 15-22).

The DER officials informed the defendant that no additional requests to dispose of hazardous wastes would be approved "until this matter is resolved." (N.T. 2/4/86, p. 102). Subsequently, several meetings were held

between the defendant and DER officials. As a result of these discussions, the defendant and the Commonwealth entered into a "Consent Order and Agreement" (Commonwealth Exhibit No. 13). The agreement provided that Fiore would apply for a water quality permit (NPDES) which would set certain limits on the chemicals discharged from the site. If the discharge exceeded those limits, the defendant agreed to either establish a treatment plant on the site or collect the discharge and transport it to a treatment plant (N.T. 2/4/86, pp. 103-104).

Subsequently, in November of 1983, James R. Shack, a solid waste specialist for the DER, who took samples from both the 810 pipe and the 711 pipe, noticed that the discharge flow from the 810 pipe had lessened significantly and odors no longer existed (N.T. 2/4/86, p. 207). On July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. As he was curious about this phenomenon, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates (N.T. 2/4/86, pp. 209-211).

Charles Kroll, a welder, testified that he was hired during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to an as yet unused disposal pit (N.T. 2/4/86, pp. 244-247). Mr. Kroll indicated that the defendant observed this pipe installation. In fact, he stated that the defendant instructed him to hide the smaller pipe with a "good size rock." (N.T. 2/4/86, pp. 245-246). Another welder, Elmer Holmes, testified that during the same time period, he was personally contacted and hired by the defendant to

install a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the ground. Inside this stand pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type wrench, could be turned on and off (N.T. 2/4/86, pp. 305-311).

The capping of the 810 pipe prevented the flow of water from under the Phase I pit into the 810-711 monitoring point. This was the discharge which previously had given off organic odors leading to the finding that hazardous wastes were seeping into the aquifer running under the pit. The newly installed connecting pipe brought water from an as yet unopened pit to a point in front of the cap. Had this alternation not been made, there would have been no flow at all at the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and on into an unnamed tributary of the Youghiogheny River. Tracy Opfar and John Opfar, employees of the defendant, testified that the co-defendant, Scarpone, and others would open this valve at night and on weekends when the DER officials were not likely to appear to check the monitoring point.

Although the defendant was not charged with polluting the waterways, the Commonwealth's evidence established that when the valve was turned on, a discharge flowed from the outfall pipe into the tributary. Samples of this discharge were collected in small stainless steel

buckets (N.T. 2/4/86, pp. 424-433). These samples were transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists, David Clemons and Homer Moore. The samples, marked Commonwealth's Exhibits 44-A, 44-B, 45-A, and 45-B, all contained mensurable amounts of hazardous wastes (N.T. 2/4/86, pp. 499-502, 529-530).

Regarding the perjury charge, the Court read to the jury the defendant's sworn testimony from an August 7, 1984, proceeding before the Honorable Francis A. Barry of the Commonwealth Court of Pennsylvania. As part of this testimony, defense counsel asked the defendant the following question: "Mr. Fiore, is there to the best of your knowledge a plate anywhere in the pipe at monitoring well 8-10?" The defendant responsed, "Not that I know of." On cross-examination, the Commonwealth asked the defendant, "Mr. Fiore, did you plug the 8-10 pipe?" The defendant replied, "No." (N.T. Excerpt 2/7/86, pp. 26-30).

Trial Two (Non-Jury)

The credible evidence in this trial established beyond a reasonable doubt that the defendant unlawfully discharged hazardous waste leachate from the Phase I pit into an unnamed tributary of the Youghiogheny River, and unlawfully accepted for disposal certain wastes without having first obtained permission from the DER to do so.

Leachate is defined as "a liquid waste which is generated when surface water or ground water mixes with the solid waste. This water dissolves or absorbs some of the

soluble fraction of the solid waste, removing and carrying it away. The leachate takes on the characteristic[s] of the waste, of the solid waste which it [is] generated from." (N.T. 6/17/86, p. 122).

According to the defendant's permit, the defendant was not permitted to discharge leachate from his facility (N.T. 6/17/86, p. 122). The permit required that all leachate be removed from the facility and transported to an approved treatment facility (N.T. 6/17/86, pp. 132-134).

The testimony of several former employees of the defendant indicated that rather than transport the leachate to the approved treatment facilities, the defendant chose to dispose of the leachate by pumping it out of the Phase I pit into a tributary of the Youghiogheny River. This pumping activity, which usually took place at night and on weekends, occurred regularly over a period of two to three years. The pumping resulted in the water in the tributary becoming dirty, oily and foamy (N.T. 6/17/86, pp. 292-293, 298-299, 302-303, 412-415, 431-432, 462-464, 547-549).

The testimony of several former employees of the defendant indicates definitively that rather than transport the leachate to either of the approved treatment facilities, the defendant chose to dispose of the leachate by pumping it out of the Phase I pit into a tributary of the Youghiogheny River.

Carl Meetze, who worked for the defendant from October, 1980, until December, 1982, stated that he and Theodore Opfar would place a pump at the wateredge of the pit, connect a hose to the pump, and direct the hose over the dike into the tributary (N.T. 6/17/86, pp.

292-293). He participated in pumping the leachate ("the dirty waste water"), usually at night or on weekends, out of both the temporary pit and the Phase I pit "between 15 and 20 times." (N.T. 6/17/86, pp. 298, 302-303). Mr. Meetze described the appearance of the creek during and after the discharge as follows: "It would be dirty. Sometimes looked oily. And sometimes later on it would start foaming, making a dirty looking foam up around the bank." (N.T. 6/17/86, p. 299). Mr. Meetze further testified that the defendant directed the pumping activity on occasion, saw the pump actually running, and saw the leachate being discharged into the tributary (N.T. 6/17/86, pp. 304, 334-335). In fact, the defendant contacted Mr. Meetze after he quit the defendant's employ and requested that Mr. Meetze tell the DER that Theodore Opfar "took care of all the water." (N.T. 6/17/86, pp. 305-308).

Mr. Meetze's testimony concerning the pumping activity was corroborated by the testimony of four other employees of the defendant. Michael Toth and William Baird testified that they saw the pump being operated on several occasions (N.T. 6/17/86, pp. 412-415, 431-432). David Ross stated that he not only witnessed the pumping activity, he actually operated the pump on one occasion (N.T. 6/17/86, pp. 462-464). Tracy Opfar stated that he operated the pump about 20-25 times with the help of his father, Theodore Opfar (N.T. 6/17/86, pp. 547-549).

As further proof of this unlawful pumping activity, the Commonwealth presented the testimony of a professional engineer, Gregory Farrell, who stated that according to his calculations (which took into account the amount of material dumped into the pit, evaporation, water seepage, etc.), the pit should have contained 53,082

cubic yards of waste and water on November 26, 1984. However, according to Mr. Farrell, the actual amount of waste and water in the pit on November 26, 1984, was 47,111 cubic yards – a difference of 5,971 cubic yards or 1,205,903 gallons (N.T. 6/17/86, pp. 574-575).

Regarding the disposal of certain wastes without permission, the testimony showed that the defendant accepted wastes from Ohio Barge Lines, Conoco Coal, and U.S. Steel-Edgar Thompson Works. The wastes from Ohio Barge Lines, which consisted of engine oil and grease, were collected on December 10 and 15, 1981, and dumped into the demolition site (N.T. 6/17/86, pp. 404-406). The testimony of Dan Peterson indicated that only the Phase I pit – not the demolition site – was permitted to accept this type of industrially generated waste (N.T. 6/17/86, pp. 103, 107).

The wastes from Conoco Coal were collected and disposed of at the defendant's facility between December 9, 1981, and January 25, 1982. The defendant did not receive approval from the DER for the disposal of these wastes from Conoco Coal until September, 1982 – approximately eight months after the disposal project had been completed (N.T. 6/17/86, p. 150; Commonwealth Exhibits 17-E through 17-VV).

The wastes from U.S. Steel-Edgar Thompson Works consisted of a load of grease which was hauled from the plant and dumped into the Phase I pit in December, 1981 (N.T. 6/17/86, pp. 460-461). A search of the DER records by Mr. Peterson indicated that the defendant had never received approval from the DER for the disposal of these wastes (N.T. 6/17/86, p. 155).

I.

The defendant alleges that the Investigating Grand Jury lacked jurisdiction and used unlawful procedures.

The authority to convene an investigating Grand Jury and the provisions under which this type of jury serves are found in the investigating Grand Jury Act, 42 Pa.C.S. § 4541, *et seq.* The purpose of this Act is to enhance the ability of the Commonwealth to inquire into criminal activity or public corruption reaching into several counties. *Commonwealth v. Bradfield,* 352 Pa. Super. 490, 508 A.2d 568 (1986).

Section 4544(a) of the act, which provides for the convening of a Multi-County Investigating Grand Jury, states:

> Application for a multicounty investigating grand jury may be made by the Attorney General to the Supreme Court. In such application the Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary because of organized crime or public corruption or both involving more than one county of the Commonwealth and that, in his judgment, the investigation cannot be adequately performed by an investigating grand jury available under section 4543 (relating to convening county investigating grand jury). The application shall specify for which counties the multicounty investigating grand jury is to be convened. Within ten days of receipt of such application, the court shall issue an order granting the same. Failure by an individual justice to grant such application shall be appealable to the entire Supreme Court.

The defendant alleges that the *Application Requesting an Order Directing that a Multi-County Investigating Grand Jury having Statewide Jurisdiction be Summoned* filed with the Supreme Court by the Attorney General, pursuant to this provision, was improper in three respects and that the Supreme Court's Order granting the Application was improper in one respect.

First, the defendant contends that the Application does not specify for what counties the Investigating Grand Jury is to be convened. At a hearing held on December 13, 1985, the Commonwealth introduced, as Exhibit A, a copy of the Application via the testimony of Robert L. Keuch, the Second Deputy Attorney General and Director of the Criminal Law Division of the Attorney General's Office. Contrary to the defendant's allegations, Paragraph 7 of the Application states as follows: "Applicant hereby specifies, pursuant to Section 216(a)(2) of the Act, 42 Pa.C.S. § 4544, that the Multi-County Investigating Grand Jury be convened for all counties within the Commonwealth." Accordingly, the Commonwealth has complied with the requirement that it specify for which counties the multi-county investigating grand jury is to be convened; and, as such, the defendant's allegation is incorrect.

Secondly, the defendant contends that the Application contains no reason or explanation why a County Investigating Grand Jury would not suffice to investigate the crimes in this matter. A review of the Act indicates that there is no requirement that the Attorney General explain his reasons for requesting a Multi-County Investigating Grand Jury. The Act merely requires that the

Attorney General state that "in his judgment" the investigative resources of a statewide grand jury, rather than a county grand jury, are necessary to investigate the presence of organized crime or public corruption. The Attorney General did so in Paragraphs 4 and 5 of the Application. In addition, Paragraph 6 of the application lists several examples of organized crime and public corruption which involve more than one county in this Commonwealth. The Attorney General has, therefore, complied with the requirements of the Act.

Thirdly, the defendant contends that the Application did not specify that any crimes involving improper waste disposal or any violation of the Solid Waste Management Act or the Clean Streams Law would be investigated. Once again, a review of the Act indicates that there is no requirement that the Attorney General specify all the types of crimes to be investigated by the Multi-County Investigating Grand Jury. In fact, to require the Attorney General to so specify would be completely impractical. The Multi-County Investigating Grand Jury is convened for a period of at least eighteen months. The Jury's purpose is not to investigate one or two matters; but rather, it is to investigate several matters, many of which the Commonwealth would be unable to identify at the time the Grand Jury was convened. Accordingly, as the defendant's contention is not supported by the Act, we find it to be meritless.

Fourthly, the defendant contends that the Supreme Court's Order granting the Application failed to specify what counties would supply jurors and in what ratios. On the contrary, the Supreme Court's Order specifically states the following:

(4) That the Court Administrator of Pennsylvania is directed to draw six counties at random from the statewide pool of 67 counties, pursuant to the provisions of Rule 271(a)(1) of the Pennsylvania Rules of Criminal Procedure and that said six counties, plus Dauphin county, shall together supply jurors for the investigating grand jury;

(5) That the Court Administrator of Pennsylvania is directed to obtain the names and addresses of persons residing in the aforesaid counties who are eligible by law to serve as grand jurors, pursuant to the provisions of Rule 271(a)(2) of the Pennsylvania Rules of Criminal Procedure;

(6) That the total of such names of prospective jurors to be collected shall be two hundred (200) of which fifty (50) shall be selected at random and summoned by the Court Administrator of Pennsylvania to Dauphin County, Pennsylvania. The Supervising Judge shall thereafter empanel the investigating grand jury from this panel of fifty (50) prospective jurors . . .

Thus, the defendant's contention concerning the Supreme Court's Order is meritless.

In addition to the above challenges to the jurisdiction of the Multi-County Investigating Grand Jury, the defendant alleges that the Office of the Attorney General lacked investigative or prosecutorial authority in this matter. This contention is incorrect on two grounds. First, as indicated above, we found no impropriety in the manner in which the Investigating Grand Jury was impaneled. Pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-205(a)(7), the Attorney General has the power

to prosecute in any county criminal court all indictments returned by an investigating grand jury obtained by the Attorney General. Secondly, if the impaneling of the Grand Jury was improper, the Attorney General, pursuant to 71 P.S. § 732-205(a)(6), has the authority to prosecute criminal charges investigated by and referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provisions. In this case, the charges against the defendant arose under the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, and the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, due to the defendant's improper disposal of hazardous waste and his efforts to conceal this disposal by corrupting government officials. Both the Solid Waste Management Act and the Clean Streams Law entrust the enforcement of their provisions to the Department of Environmental Resources (DER), a state agency. The DER investigated this case and referred the criminal charges to the Attorney General and, pursuant to Subsection (a)(6), the Attorney General initiated the prosecution against the defendant. Accordingly, the defendant's allegation that the Attorney General lacked prosecutorial authority in this matter is incorrect.

In summary, as we find that the Multi-County Investigating Grand Jury was properly impaneled, we find that it had jurisdiction to issue presentments in this matter; and therefore, the defendant's challenges to the contrary are without merit

II.

The defendant alleges that his constitutional right to a speedy trial, pursuant to Pa.R.Crim.P. 1100, has been violated.

Pennsylvania Rule of Criminal Procedure 1100 requires that trial commence within 180 days of the date on which the criminal complaint was filed. Also, prior to the expiration of the period of commencement of trial, the Commonwealth may apply to the court for an extension of this time period. Pa.R.Crim.P. 1100(c)(1). Such application shall be granted only upon "a record showing that trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth, and if the delay is due to the court's inability to try the defendant within the prescribed period, upon findings based upon a record showing the causes of the delay and the reasons why the delay cannot be avoided." Pa.R.Crim.P. 1100(c)(3).

The criminal complaint herein was filed on June 6, 1985. This highly technical complaint charged the defendant with over one-hundred violations of the Solid Waste Management Act and other environmental laws. On June 20, 1985, the Commonwealth petitioned the President Judge of Allegheny County to appoint a special district justice, one who was a lawyer, to preside over the preliminary hearings in these matters. District Justice Gary Zyra was appointed as requested by the Commonwealth.

The defense then petitioned the district Justice to set aside several days for the preliminary hearings. The hearings began on August 6, 1985, and lasted several days with an interruption of a few weeks in order to permit the

parties to make legal argument about the admission of certain electronically recorded events. On August 30, 1985, the defendant was held for court on more than one-hundred counts. Throughout this period of time, the defendant's attorney, John J. Doherty, Esquire, assured the prosecutor that his concern was not that the trial commence speedily but on the contrary that he have sufficient time for discovery and pre-trial motions due to the complexity of the case.

Sometime thereafter, this case was assigned to this member of the court. In mid-October, 1985, a pre-trial conference was held. At this conference, the trial of this matter was scheduled for February 3, 1986. As this date was well beyond the final trial date of December 3, 1985, the Commonwealth filed a Motion to Extend the Time for Commencement of Trial. A hearing was held on this motion on November 19, 1985. At the conclusion of this hearing, we granted the Commonwealth's Motion to Extend.

On December 13, 1985, after a lengthy discussion with the defendants and all counsel, we granted defendant-Scarpone's Motion for Severance. This severance resulted in this case becoming two trials rather than one trial. The first trial, which began as scheduled on February 3, 1986, included all charges involving both defendants. This trial concluded on February 18, 1986. The defendant's trial on Bribery and other related charges (CC No. 8509823) began as scheduled on March 11, 1986. That trial concluded on the morning of March 19, 1986. On the afternoon of March 19, 1986, a hearing was held on the Commonwealth's Petition for Extension of Time concerning the second trial on the charges in the within

case. At that time, we took judicial notice of the fact that the next available date for the commencement of a trial estimated to last approximately two weeks would be June 16, 1986 (N.T. 3/19/86, pp. 7-12). The defendant's final trial began on June 17, 1986.

The Commonwealth's Motion was granted for the following reasons:

First, we note that judicial delay due to crowded court dockets is a valid basis for establishing that trial cannot commence within the allotted 180 days. *Commonwealth v. Bogan*, 355 Pa. 32, 512 A.2d 1194 (1986). After reviewing our calendar, we found that a trial of approximately three weeks in length could not be scheduled prior to February 3, 1986 (N.T. 11/19/85, p. 9). This was due to several factors. Most notably, the fact that the *defendant had two other lengthy trials* also scheduled before this member of the court.

Secondly, the present matter and the defendant's other pending matters all involved complex and voluminous pre-trial motions which were scheduled for a hearing on December 13, 1985 – ten days after the final trial date of December 3, 1985. These pre-trial motions concerned, *inter alia*, the Attorney General's authority to prosecute, the powers of the investigating grand jury, and the circumstances of the defendant's prosecution under the Solid Waste Management Act. Due to the complexity of these pre-trial motions, ample time had to be set aside for testimony, argument and rulings on these motions.

Thirdly, the defendant argues that either the Court or the Commonwealth should have investigated the possibility of transferring this case to another judge whose

calendar would have permitted an earlier trial date. This argument has been specifically rejected by our Supreme Court in *Commonwealth v. Crowley*, 502 Pa. 393, 466 A.2d 1009 (1983). In *Crowley*, the Court stated, "[a requirement that] urban areas with severely crowded criminal and civil dockets must continually arrange and rearrange their schedules to accommodate the 180 days rule would be ill-advised." *Id.*, 466 A.2d at 1013. Moreover, the likelihood that another member of the court could schedule three complex trials any sooner than this member of the court was at best miniscule.

Fourthly, regarding the defendant's final trial, we note that, as we found at the hearing on March 19, 1986, the delay of this trial was due not only to our crowded court calendar, but to the fact that both the defense and the prosecution had grossly underestimated the length of the defendant's two prior trials. This miscalculation by counsel reeked havoc with our calendar and required the postponing and rescheduling of several pending matters. This rescheduling of other matters resulted in June 16, 1986 being the earliest date available to begin the defendant's final trial.

In this connection, we also note that the second trial was, to a certain extent, a unique continuation of the first. The nature of co-defendant Scarpone's request for severance was that Mr. Fiore was charged with hundreds of violations but he, Scarpone, was charged with only six or seven. Scarpone argued that it would be unfair to cause him to participate in a trial that would last for several weeks dealing largely with matters in which he was not involved as his financial resources were considerably less than those of defendant Fiore. We agreed to sever the

trials in such a way that Fiore and Scarpone would be tried together on only those matters as to which they stood charged as co-defendants, and that Fiore would then be tried separately on the remaining counts. The record is clear that on December 13, 1985, the defendant Fiore, with counsel in court, agreed to this bifurcation of the environmental charges against him. We note also that the environmental charges were only part of the complex charges brought against this man and that, in fact, Fiore ended up with three trials in order to dispose of these matters. While Fiore ultimately elected to proceed non-jury for his second environmental trial, the fact of the matter is that at the time when it was scheduled, he adamantly insisted on a jury trial requiring the court to set aside sufficient time for jury selection and trial.

Mr. Fiore simply wanted to have it both ways. On the one hand, he wanted a thorough preliminary hearing and requested that several days be set aside for his hearing together with a long interruption for legal argument.

This, to our mind, was a perfectly proper defense request but obviously it required that much of the 180-day period be consumed by pre-trial proceedings. When it came time to waive Rule 1100, he simply wanted to preserve this issue for a possible attack if he were convicted. A defendant simply cannot have it both ways.

Based upon the foregoing, we find that the Commonwealth made a more than adequate showing that it acted with due diligence in attempting to commence the trial in the present case within the prescribed period of time. Moreover, much of the 180-day period was consumed by proper delays initiated by prior defense counsel acting in

the defendant's best interest during the pre-trial proceedings. While this may not be excludable time under the rule, it is certainly a proper consideration when deciding whether or not to grant the Commonwealth's Motion to Extend the Time for Trial. Accordingly, we find no error in our decision to grant the Commonwealth's Motion to Extend.

III.

The defendant alleges that we erred in failing to quash the criminal information due to the unconstitutionality of certain enforcement/penalty provisions of the Solid Waste Management Act (SWMA), 35 P.S. § 6018.101 *et seq.*

The SWMA was enacted by the legislature in 1980 to provide for the planning and regulation of solid waste storage, collection, transportation, processing, treatment and disposal. The stated purpose of the SWMA, as set forth in 35 P.S. § 6018.102, is to:

> (1) establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive solid waste management;
>
> (2) encourage the development of resource recovery as a means of managing solid waste, conserving resources and supplying energy;
>
> (3) require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and

permits for hazardous waste storage, treatment, and disposal;

(4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes;

(5) provide a flexible and effective means to implement and enforce the provisions of this act;

(6) establish the Pennsylvania Hazardous Waste Facilities Plan, which plan shall address the present and future needs for the treatment and disposal of hazardous waste in this Commonwealth;

(7) develop an inventory of the nature and quantity of hazardous waste generated within this Commonwealth or disposed of within this Commonwealth, wherever generated;

(8) project the nature and quantity of hazardous waste that will be generated within this Commonwealth in the next 20 years or will be disposed of within this Commonwealth, wherever generated;

(9) provide a mechanism to establish hazardous waste facility sites;

(10) implement Article I, section 27 of the Pennsylvania Constitution; and

(11) utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective, comprehensive solid waste management program.

The defendant makes several challenges to the Criminal Penalties, § 6018.606(a) and (b), sections of the SWMA. These sections state:

(a) Any person, other than a municipal official exercising his official duties, or any municipality who violates any provision of this act, the rules and regulations of the department, or any order of the department, or any term or condition of any permit upon conviction thereof in a summary proceeding, shall be sentenced to pay a fine of not less than $100 and not more than $1,000 and costs and, in default of the payment of such fine and costs, to undergo imprisonment for not more than 30 days.

(b) Any person, other than a municipal official exercising his official duties, who violates any provision of this act, any rule or regulation of the department, any order of the department, or any term or condition of any permit, shall be guilty of a misdemeanor of the third degree and, upon conviction, shall be sentenced to pay a fine of not less than $1,000 but nor [sic] more than $25,000 per day for each violation or to imprisonment for a period of not more than one year, or both.

All of the defendant's challenges were specifically ruled upon by our Supreme Court in *Commonwealth v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358 (1986), wherein the Court upheld the constitutionality of these provisions of the SWMA. First, the defendant challenges the constitutionality on the ground that paragraphs (a) and (b) proscribe identical conduct yet provide for vastly

different penalties. In rejecting this equal protection argument, the Court stated, "there is no equal protection infirmity in an act merely because it allows the prosecutor or enforcement agency to choose between two different penalty provisions for similar unlawful conduct and that the mere *possibility* that a prosecutor *might* selectively enforce the provisions of an act for improper motives does not invalidate that act." (Emphasis in original) *Id.*, 515 A.2d at 1364).

Secondly, the defendant argues that paragraphs (a) and (b) create arbitrary classifications. The Supreme Court, in *Parker White*, held that the SWMA does not create any classifications. *Id.*, 515 A.2d at 1363. Further, if there are any classifications created by these sections, they have "a rational basis and [they bear] a fair and substantial relation to legitimate objects of the legislation," and therefore, there is no violation of equal protection principles. *Id.*, 515 A.2d at 1366.

Thirdly, the defendant argues that paragraphs (a) and (b) provide no guidance for prosecutors or agencies charged with enforcing them. In rejecting this due process argument and holding that the decision whether to prosecute an alleged offender under paragraph (a) or (b) is a matter within the sound discretion of the prosecutor or agency, the Supreme Court stated:

> In light of the foregoing principles, it should be obvious that sections 606(a) and 606(b) of the Act do not offend due process in allowing the prosecutor or agency to choose between ranges of penalties nor in failing to provide precise standards narrowing the prosecutorial discretion to so choose. Appellees were

> *fully* informed by the terms of the Act of exactly what conduct was proscribed as well as the full range of civil, criminal and equitable remedies and penalties to which they might be subjected for violating a substantive provision of the Act. It is of no constitutional significance that appellees were not advised in advance as to which of the two applicable penalty ranges the prosecutor or agency would choose to prosecute them under for their violations (alleged) of the Act, for a defendant has no right to a particular sentence within the range authorized by statute. (Emphasis in original) *Id.*, 515 A.2d at 1368.

Fourthly, the defendant argues that paragraphs (a) and (b) constitute an unlawful delegation of authority to the prosecutors or agencies charged with enforcing them. In rejecting this argument, the Supreme Court stated:

> From what we have stated in the preceding sections, it is apparent that the legislature has delegated *none* of its authority to the prosecutors and agencies. Quite to the contrary, the Act specifically and unambiguously establishes "what constitutes a crime," and specifically and unambiguously establishes the full range of penalties possible for commission of those crimes. That the legislature has allowed the prosecutor some discretion and much flexibility in choosing from among the full panoply of civil, criminal and equitable remedies does not delegate any of the legislative power or function to the executive branch. (Emphasis in original) *Id.*, 515 A.2d at 1369.

In summary, as our Supreme Court has specifically ruled on all of the defendant's challenges to §6018.606 (a)

and (b), we find no error in our denial of the defendant's Motion to Quash the Information.

IV.

The defendant alleges that we erred in failing to quash the criminal information because: (a) certain provisions of the Solid Waste Management Act (SWMA), 35 P.S. §6018.101 *et seq.*, unconstitutionally delegates legislative authority, and (b) certain actions by the Department of Environmental Resources (DER) were beyond the scope of its delegated authority.

a.

The delegation of legislative authority has long been recognized in this Commonwealth. In *Bell v. Driscoll*, 343 Pa. 109, 21 A.2d 912, 915 (1941), the Supreme Court stated that "[w]here the legislature establishes primary standards and then delegates to an administrative body the power to determine some fact or state of things upon which it makes, or intends to make, its own action depend, it is the legislature which has legislated and not the administrative body." Thus, if the legislature's basic policies are expressed in the form of general statutory standards which are reasonable and provide adequate guidance, an administrative agency may be delegated the authority to implement the legislative intent and to exercise discretion in carrying out its responsibilities without violating any constitutional principles. See *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975); *Commonwealth v. Cherney*, 454 Pa. 285, 312 A.2d 38 (1973).

The defendant argues that the SWMA impermissibly grants to the Department of Environmental Resources (DER) and the Environmental Quality Board (EQB) certain legislative powers – i.e., the authority to determine what type of conduct is subject to criminal sanctions under §§301, 302(a) and 401(a) of the SWMA. A review of these sections of the SWMA, in conjunction with §§104 and 105 (which set forth the powers and duties of the DER and the EQB), indicates rather clearly that the defendant's allegation is without merit.

The SWMA, in §104, confers upon the DER the authority to administer its provisions, including the regulation of the storage, collection, transportation, processing, treatment and disposal of solid waste and the issuance of permits, licenses and orders specifying the terms and conditions thereof. In §105, the SWMA charges the EQB with the duty "to adopt rules and regulations of the department to accomplish the purposes and to carry out the provisions of this act, including but not limited to the establishment of rules and regulations relating to the protection of safety, health, welfare and property of the public and the air, water and other natural resources of the Commonwealth."

Sections 301, 302(a) and 401(a) provide as follows, respectively:

Section 301. Management of residual waste

> No person or municipality shall store, transport, process, or dispose of residual waste within this Commonwealth unless such storage, or transportation is consistent with or such processing or disposal is authorized by the rules

and regulations of the department and no person or municipality shall own or operate a residual waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the department.

Section 302(a). Disposal, processing and storage of residual waste

(a) It shall be unlawful for any person or municipality to dispose, process, store or permit the disposal, processing or storage of any residual waste in a manner which is contrary to the rules and regulations of the department or to any permit or to the terms or conditions of any permit or any order issued by the department.

Section 401(a). Management of hazardous waste

(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department.

Viewing all of these sections together, it is clear that the defendant's contention is meritless for the following reasons. Initially, his argument is inapplicable to the facts

of the present case because the defendant was not charged with violating any rule or regulation promulgated pursuant to the SWMA. Rather, the defendant was charged with violating several direct provisions of the SWMA: §301 – disposing of residual wastes and operating a residual waste disposal facility without a permit, §302(a) – disposing of residual wastes and operating a residual waste facility contrary to the conditions contained in the permit issued for the facility by the DER, §401(a) – disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, and §501(a) – using his property and the property of others as a solid waste disposal area without a permit. We find no error in our denial of the defendant's request to quash the information on this ground.

Secondly, contrary to the defendant's contention, the SWMA contains a clear and definite statement of the legislature's policies together with reasonable and adequate standards to guide both the DER and the EQB in their implementation of these policies. As stated previously, §102 sets forth the eleven purposes of the SWMA. These purposes contain guidelines which limit the discretion of the DER and the EQB, and include the requirement of permits "for the operation of municipal and residual waste processing and disposal systems" and the protection of "the public health, safety and welfare from the short and long-term dangers of transportation, processing, treatment, storage, and disposal of all wastes."

Thirdly, the defendant suggests that the regulatory scheme of the SWMA violates the constitution in that the legislature failed to state exactly what regulations, if violated, would constitute a crime. On the contrary, the

SWMA, in §606, provides specific criminal penalties, including fines and imprisonment, for violations of any and all of the statutory provisions and/or departmental rules and regulations.

Based on the foregoing, which includes our careful reading of the SWMA, we find that our denial of the defendant's Motion to Quash due to the legislature's unconstitutional delegation of authority in the SWMA was correct.

b.

The defendant contends that the DER and the EQB acted beyond the scope of their authority in impermissibly including as a permit condition the requirement that he submit a Module One for departmental approval with respect to each and every waste – residual or hazardous – to be disposed of in the Phase I pit at his disposal facility.

In this regard, the defendant argues that the DER/EQB regulation requiring operators of hazardous waste disposal facilities to obtain DER approval before disposing of a specific waste from a particular generator for the first time conflicts with §501(c) of the SWMA, which the defendant maintains requires only that an operator file one notification with the DER identifying, generically, each hazardous substance received at the facility. The defendant's contention is inaccurate. Section 104(7) of the SWMA specifically authorizes the DER to issue permits and specify therein the conditions thereof in order to implement the goals and provisions of the SWMA. Also, §502(f), which provides for permit and license application

requirements, provides, in pertinent part: "The department may require such other information, and impose such other terms and conditions, as it deems necessary or proper to achieve the goals and purposes of this act." Accordingly, the DER acted within the scope of its delegated authority in including conditions in the defendant's permit requiring prior approval for each industrial waste to be deposited in the Phase I pit of the disposal facility.

Based on the foregoing, which, once again, includes our careful reading of the SWMA, we find that our denial of the defendant's Motion to Quash due to certain actions by the DER and EQB which were beyond the scope of their authority was correct.

V.

The defendant alleges that we erred in failing to dismiss all charges due to a violation of the Statute of Limitations.

Section 617 of the Solid Waste Management Act (SWMA), 35 P.S. §6018 *et seq.*, entitled Limitation on Action, provides:

> The provisions of any other statute to the contrary notwithstanding, actions for civil and criminal penalties under this act may be commenced at any time within a period of 20 years from the date the offense is discovered.

The charges in the within matter were filed on June 6, 1985. All charges concerned conduct by the defendant which took place in the preceding six years. Thus, under the twenty-year period of limitations, all charges were properly commenced.

The defendant would have us ignore §617 and apply the period of limitations as set forth in 42 Pa.C.S. §5551 *et seq.*, referring to criminal prosecutions. Having reviewed both of these statutes, we find unquestionably that the former applies in the within matter. Further, we note that the defendant's position is supported by neither sound reasoning nor legal authority. Accordingly, we find that as all charges were filed within the applicable statute of limitations, the defendant is not entitled to a dismissal of the charges.

VI.

The defendant alleges that the evidence proffered by the Commonwealth during his first environmental trial was insufficient to sustain his convictions in the within matter.

The test for sufficiency of the evidence is whether the evidence admitted at trial is sufficient to prove every element of the crime charged beyond a reasonable doubt. *Commonwealth v. Davis*, 491 Pa. 363, 421 A.2d 179 (1980). In this regard, the evidence must be viewed in the light most favorable to the party in whose favor the verdict was returned, and all reasonable inferences must be accepted as true. *Commonwealth v. Burton*, 450 Pa. 532, 301 A.2d 599 (1973). Further, the Commonwealth does not have to establish guilt to a mathematical certainty and it is sufficient if the circumstances are consistent with criminal activity even though they might likewise be consistent with innocent behavior. *Commonwealth v. Herman*, 227 Pa. Super. 326, 323 A.2d 228 (1974).

(a) Notice of the Offense in Count One

The defendant alleges that Count One of the criminal information does not give notice of the offense charged. The due process requirement of notice can be succinctly stated as follows: A defendant must be given clear notice of the charges against him so that he can properly prepare a defense. *Commonwealth v. Fulton*, 318 Pa. Super. 470, 465 A.2d 650, (1983).

Count One of the criminal information states:

> The defendant William Fiore did operate a hazardous waste disposal facility without a permit from the DER for such disposal facility, to wit, the defendant operated his hazardous waste disposal facility in Elizabeth Township, Allegheny County following alterations, carried out by accomplices and others acting under his direction, of its approved monitoring pipes in 1983 without a permit from the DER for such a facility, in violation of 35 P.S. §6018.401(a), a felony of the second degree pursuant to 35 P.S. §6018.606(f).
>
> 18 Pa.C.S. §306

The defendant alleges that the alteration of the pipes had no effect on the validity of his permit, and therefore, as he had a valid permit, Count One fails to provide him with adequate notice of the offense. The defendant's allegation and its surrounding reasoning are, at best, circular and confusing. Count One sets forth in clear and concise language the unlawful conduct of the defendant which resulted in his operation of the disposal facility without a permit. Thus, the notice requirement is satisfied.

Further, the defendant appears to be alleging that the Commonwealth must set forth its entire proof of the crime in each count of the information. The defendant is incorrect. To require the Commonwealth to do so would be both impractical and burdensome. Our reading of Count One indicates without a doubt that the defendant was given more than adequate notice of the charged offense. Accordingly, we reject this allegation of the defendant as meritless.

(b) Possession of Necessary Permits

The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the Pennsylvania Department of Environmental Resources (DER) for such disposal facility.

In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system for the Phase I pit and, as such, the existence of that permit constitutes an absolute defense to the charges. We find the defendant's contention unpersuasive.

The permit issued by the DER authorized specified disposal activities which are to be conducted in accordance with the facility design plans and specifications submitted with the permit application. According to §610(2) of the SWMA, *it* is unlawful for any person to alter any solid waste disposal facility without a permit from the DER.

The manner in which permit applications are prepared, submitted, evaluated and approved or denied by the DER was explained via the testimony of Dan Peterson, an operations supervisor in the Pittsburgh Region of the Bureau of Solid Waste Management. Mr. Peterson stated that after the applicant acquires a site for the facility, he must then hire a consultant to complete various modules which provide information and design plans for the facility. These modules would then be reviewed by the DER. After meetings between the parties and modifications (if necessary) to the modules, the permit would either be granted or denied (N.T. 2/4/86, pp. 52-54). Mr. Peterson also stated that after the disposal facility was constructed, the applicant's engineer must submit a certification indicating that the facility has been constructed in conformance with the approved modules (N.T. 2/4/86, p. 60).

With regard to the defendant's facility in Elizabeth Township, Allegheny County, Mr. Peterson testified that the defendant was issued a permit in 1979 for the Municipal and Industrial Disposal Company (MIDC). This permit was amended by the defendant submitting a Module I which identified the chemical components of each new waste to be disposed of and the DER, after conducting compatibility studies between the new waste and the liner of the Phase I pit, approving the disposal of the new waste (N.T. 2/4/86, pp. 56-63).

The defendant's facility contains an under-drain identified by Mr. Peterson as pipe 810. This under-drain, which runs beneath the disposal pit, converges with the 711 pipe in a manhole and emits a single discharge. The purpose of the under-drain, according to Mr. Peterson,

was to "convey[ ] mine water beneath the disposal pit carrying it away from the liner. In addition, it was mentioned in the permit as a monitoring point . . . to check on the integrity of the liner. If the liner would fail, it would be natural for any materials coming out of the pit through the liner to end up in the under-drain." (N.T. 2/4/86, pp. 79-83).

In late 1982 and early-to-mid 1983, Mr. Peterson, during his inspection visits to the defendant's facility, detected a "strong organic odor coming from the manhole." Organic odors often indicate the presence of hazardous waste in the aquifer flowing beneath the pit. Samples of the discharge into the manhole from the 810 pipe and the 711 pipe were taken by James R. Shack, a solid waste specialist for the DER. The defendant's explanation of the odor was that it was the result of "the air settling in the low point, odors from the pit . . . had settled there." (N.T. 2/4/86, pp. 96-102). Due to these odors, Mr. Peterson advised the defendant that no more Module I requests would be approved until the matter was resolved (N.T. 2/4/86, p. 102).

In November, 1983, Mr. Shack noticed that the discharge flow from the 810 pipe had lessened significantly and the odors no longer existed. The defendant's explanation for this was that the mine had "cleaned itself out." (N.T. 2/4/86, p. 207). Mr. Shack's testimony was corroborated by the testimony of Sam Harper, a DER water quality specialist, who stated that during August, September and October, 1983, he detected a decrease in the flow from the 810 pipe (N.T. 2/4/86, pp. 322, 334).

During a routine inspection on July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. In an effort to investigate the reason for the lack of discharge, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates (N.T. 2/4/86, pp. 209-211). A photograph of this cap, taken by Mr. Shack on the same day, was admitted into evidence as Commonwealth Exhibit 23 (N.T. 2/4/86, p. 212).

An investigation into the circumstances surrounding the capping of the 810 pipe revealed that a welder, Charles Kroll, was hired during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to an as yet unused disposal pit (N.T. 2/4/86, pp. 244-247). The effect of these alterations was to seal off any actual discharge from the 810 pipe (which ran under the Phase I disposal pit) and replace it with a clean discharge from the unused pit. This prevented the detection of seepage of hazardous waste into the aquifer. Both Mr. Peterson and Mr. Shack testified that no one ever advised either of them that there had been any alterations to the 810 pipe (N.T. 2/4/86, pp. 156, 208).

The foregoing testimony clearly indicates that the defendant failed to operate his disposal facility in accordance with the facility design plans and specifications as spelled out in the original permit application. The original permit application provided for the use of the 810 pipe for purposes of monitoring the water beneath the disposal pit. It was necessary to monitor the mine water to ensure that the disposed of wastes were not contaminating the water and the soil. The alterations to the 810

pipe so that it was monitoring the clean water in an usued [sic] disposal pit rather than monitoring the mine water under the Phase I pit constituted a willful and deliberate act by the defendant designed to operate his facility outside the parameters of the permit. In fact, the defendant's alterations of the 810 pipe represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was "un-permitted" after the alterations were undertaken by the defendant. Contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which allowed the disposal of hazardous waste after the monitoring system was altered. Therefore, we reject the defendant's contention as incorrect.

(c) Actual Discharge Without a Permit

The defendant alleges that the evidence was insufficient to prove that any discharges without a permit actually occurred.

Contrary to the defendant's contention, the testimony of the Commonwealth's witnesses indicated that the defendant did, in fact, actually discharge wastes. Elmer Holmes, a welder, testified that during the warm weather in 1983, he went to the defendant's disposal facility at the request of the defendants and installed a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the ground. Inside this stand pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type

wrench, could be turned on and off. On top of the stand pipe was a cap (N.T. 2/4/86, pp. 305-311).

Tracy Opfar, an employee of the defendant, testified that on at least five or six occasions he accompanied his father, Theodore Opfar (the site manager), to the location of the stand pipe. Mr. Opfar testified that on these occasions, his father would move rocks and dirt from the stand pipe, remove the cap, insert a tool into the stand pipe, turn the tool, and then replace the cap and the rocks and dirt (N.T. 2/6/86 Excerpt, pp. 12, 20-22). After this procedure took place, Mr. Opfar stated that, "I could just hear a little bit of water running . . . A little bit more water running." (N.T. 2/6/86 Excerpt, p. 13). Also, Mr. Opfar stated that this procedure would take place early on a Saturday morning and then his father would return on a Sunday night and repeat the same procedure (N.T. 2/6/86 Excerpt, pp. 12-13, 23).

This testimony of Tracy Opfar was corroborated by the testimony of his brother, John Opfar. John Opfar stated that on one occasion during the summer of 1983, defendant Scarpone gave him a long bar onto which a socket had been welded and told him to go down to the manhole and turn a valve off. After looking around the manhole for a few minutes, John Opfar testified that he found a capped pipe under a rock, removed the cap, placed the tool inside the pipe and turned the valve (N.T. 2/6-7/86 Excerpt, pp. 16-18, 26).

In addition to this testimony, David Duncan, an investigator for the Toxic Waste Prosecutions Unit of the DER Bureau of Solid Waste Management, testified concerning the execution of a search warrant on September

25, 1984. During the search of the defendant's disposal site, Mr. Duncan, who was accompanied by several other persons, discovered the capped stand pipe. When they dug up the ground around the stand pipe with a backhoe, they unearthed the valve and the two-inch pipe. In order to determine what type of discharge, if any, would be emitted when the valve was turned on, the searchers dug out an area around the outfall pipe, turned on the valve and collected the discharge flowing out of the outfall pipe in small stainless steel buckets (N.T. 2/4/86, pp. 424-433). The discharge samples were then transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists, David Clemens and Homer Moore. The samples, marked Commonwealth's Exhibits 44-A, 44-B, 45-A and 45-B, all of which were taken after the valve was opened, *contained hazardous wastes* (N.T. 2/4/86, pp. 499-502, 529-530).

On the basis of this testimony, the jury could very easily have concluded that the defendant actually did discharge wastes. The testimony was clear that the defendant surreptitiously diverted the discharge flow by the use of the two-inch pipe and the valve. Also, the testimony was clear that the valve was turned on on a number of occasions and that the "opening" of the valve resulted in the discharge of the backed-up wastes through the outfall pipe into the stream. Thus, we find that there was sufficient evidence to prove that the defendant actually discharged wastes, and therefore, we find no error in the jury's verdict.

(d) Sufficiency of the Evidence of Perjury

The defendant alleges that the evidence was insufficient to establish that his sworn statement denying the existence of the cap of the 810 monitoring pipe in his testimony before the Commonwealth Court was not given with the sincere belief in its truthfulness.

Perjury is defined in 18 Pa.C.S. §4902 as follows:

> A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

In this case, the charge of Perjury arose from testimony given by the defendant in a proceeding before the Commonwealth Court on August 7, 1984. During both direct and cross examination, the defendant denied that there was a cap or plate of any sort anywhere in the 810 pipe (N.T. 2/7/86 Excerpt, pp. 27-30).

The above-stated testimony of Charles Kroll, James Shack, Tracy Opfar, John Opfar, and Charles Moore clearly indicates that there was, in fact, a metal plate welded inside the 810 monitoring pipe which capped it and prevented the flow of any further discharge from this pipe. In addition, these witnesses indicated that the defendant was, at the very least, one of the supervisors directing the "capping" procedure which took place over a weekend in the summer of 1983. The defendant's denial that there was a cap on the 810 pipe was made at a time when he was unquestionably aware that the 810 pipe had,

in fact, been capped. Thus, the jury's finding of guilt on the perjury charge is supported by sufficient evidence.

(e) Sufficiency of the Evidence of Obstruction of the Administration of Law

The defendant alleges that there was insufficient evidence to prove that he used force, threats or power. The language of the statute, however, is much broader.

Obstructing Administration of Law is defined in 18 Pa.C.S. §5101 as follows:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with a crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

The evidence, as set forth at length above, established beyond a reasonable doubt that the defendant altered the pipes comprising the underground monitoring system for the Phase I pit. The defendant's purpose in doing so was to deceive the DER inspectors by causing them to believe that the level of contamination emanating from the Phase I pit had dropped markedly. Further, the evidence also showed that when questioned by DER personnel concerning the decreased level of contaminants, the defendant did not inform them of the alteration of the

810 pipe; rather, the defendant responded that the problem had cleared itself up naturally, as he predicted it would. The result of the defendant's deception was that the DER was unable to carry out its governmental duty to monitor the groundwater in the vicinity of the Phase I pit. Thus, the defendant physically – albeit, not violently – interfered with the governmental functions of the DER. The defendant's conduct falls squarely within the category of conduct proscribed by §5101 and, therefore, the jury's finding of guilt on this charge is supported by sufficient evidence.

VII.

The defendant alleges that the evidence proffered by the Commonwealth during his final trial was insufficient to sustain his convictions in the within matter.

As we have previously stated the applicable case law concerning a challenge to the sufficiency of the evidence in Section VI, we will not reiterate it at this juncture, but merely incorporate it herein by reference.

(a) Count One and the Statute of Limitations

The defendant alleges that Count One of the criminal Information was not proven within the Statute of Limitations. As we discussed thoroughly in Section V, the defendant's allegation is based on his assertion that the applicable Statute of Limitations is two years. On the contrary, the applicable Statute of Limitations is twenty years. Accordingly, as indicated in Section V, we find this argument to be without merit.

(b) Counts One, Two and Three – Possession of a Permit for the Disposal of Leachate

The defendant alleges that the evidence was insufficient to prove that he operated a hazardous and/or residual waste disposal facility without a permit from the Pennsylvania Department of Environmental Resources (DER) for such facility.

In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he or his employees conducted the above-ground pumping activities, and that the existence of that permit constitutes an absolute defense to the charges. As in Section VI, we find the defendant's contention unpersuasive.

The permit issued by the DER authorizes specified disposal activities which are to be conducted in accordance with the facility design plans and specifications submitted with the permit application. As in the defendant's first trial, the manner in which permit applications are prepared, submitted, evaluated and approved or denied by the DER was explained via the testimony of Dan Peterson, an operations supervisor in the Pittsburgh Region of the Bureau of Solvent Management. Mr. Peterson stated that the applicant would submit a permit application to the DER. This application would be reviewed and evaluated by various technicians including engineers and scientists. After meetings between the parties and modifications (if necessary) to the modules, the permit would either be granted or denied (N.T. 6/17/86, pp. 99-100). Mr. Peterson also explained the procedure for

the approval of a Module 1 application. The Module 1 form used by an applicant for purposes of receiving authorization from the DER to accept certain stated waste streams for disposal in the applicant's waste facility (N.T. 6/17/86, p. 100).

With regard to the defendant's facility in Elizabeth Township, Allegheny County, Mr. Peterson testified that the defendant was issued a permit in 1979 for the Municipal and Industrial Disposal Company (MIDC). The MIDC facility contained three sites, denoted Site A, Site B (the Phase I pit), and Site C (the demolition site) (N.T. 6/17/86, pp. 102-105).

Mr. Peterson defined the term "leachate" as follows: "Leachate is a liquid waste which is generated when surface water or ground water or rainfall mixes with the solid waste. This water dissolves or absorbs some of the soluble fraction of the solid waste, removing and carrying it away. The leachate takes on the characteristic of the waste, of the solid waste which it is generated from." (N.T. 6/17/86, p. 122). At the defendant's Phase I pit, leachate would be formed by the mixing of rainfall with the wastes which were contained in the pit (N.T. 6/17/86, p. 123).

According to the defendant's permit, the defendant was not permitted to discharge leachate from his facility (N.T. 6/17/86, p. 122). Specifically, Paragraph H of the permit states that all leachate and surface water which accumulates in the pit must be removed. Initially, the leachate was to be removed and treated at a U.S. Steel facility. Subsequently, the defendant received permission

to transport the leachate for treatment at a DuPont plant in Delaware (N.T. 6/17/86, pp. 132-134).

The testimony of several former employees of the defendant indicated definitively that rather than transport the leachate to either of the approved treatment facilities, the defendant chose to dispose of the leachate by pumping it out of the Phase I pit into a tributary of the Youghiogheny River.

Carl Meetze, who worked for the defendant from October, 1980, until December, 1982, stated that he and Theodore Opfar would place a pump at the wateredge of the pit, connect a hose to the pump, and direct the hose over the dike into the tributary (N.T. 6/17/86, pp. 292-293). He participated in pumping the leachate ("the dirty waste water"), usually at night or on weekends, out of both the temporary pit and the Phase I pit "between 15 and 20 times." (N.T. 6/17/86, pp. 298, 302-303). Mr. Meetze described the appearance of the creek during and after the discharge as follows: "It would be dirty. Sometimes looked oily. And sometimes later on it would start foaming, making a dirty looking foam up around the bank." (N.T. 6/17/86, p. 299). Mr. Meetze further testified that the defendant directed the pumping activity on occasion, saw the pump actually running, and saw the leachate being discharged into the tributary (N.T. 6/17/86, pp. 304, 334-335). In fact, the defendant contacted Mr. Meetze after he quit the defendant's employ and requested that Mr. Meetze tell the DER that Theodore Opfar "took care of all the water." (N.T. 6/17/86, pp. 305-308).

Mr. Meetze's testimony concerning the pumping activity was corroborated by the testimony of four other

employees of the defendant. Michael Toth and William Baird testified that they saw the pump being operated on several occasions (N.T. 6/17/86, pp. 412-415, 431-432). David Ross stated that he not only witnessed the pumping activity, he actually operated the pump on one occasion (N.T. 6/17/86, pp. 462-464). Tracy Opfar stated that he operated the pump about 20-25 times with the help of his father, Theodore Opfar (N.T. 6/17/86, pp. 547-549).

The foregoing testimony clearly indicates that the defendant failed to operate his disposal facility in accordance with the provisions of his permit. The permit prohibited the defendant from discharging leachate. Paragraph H specifically required the defendant to dispose of the leachate by transporting it to a named treatment facility. Rather than do so, the defendant willfully and deliberately chose to pump the leachate out of the disposal pits into the tributary which led to the Youghiogheny River. The defendant's actions in so doing represented such a significant departure from the terms of the existing permit that the operation of the waste facility was "un-permitted." Accordingly, contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which permitted the discharge of leachate.

(c) Counts Four and Five – Possession of a Permit for Wastes from Ohio Barge Lines

The defendant contends that he possessed the necessary permit to allow him to dispose of solid wastes generated by Ohio Barge Lines.

Raymond Gee, the manager of vessel maintenance for Ohio Barge Lines from 1980-1983, testified that the operation of barges on the river generated two types of wastes – engine oil and grease – which were collected in 120-pound kegs (N.T. 6/17/86, P. 358).

Michael Toth, who was employed as a truck driver for the defendant, testified that he hauled waste materials from Ohio Barge Lines to the MIDC facility on two occasions. Mr. Toth identified Commonwealth's Exhibits 18-E and 15-F as roll-off cards dated December 15, 1981, and December 10, 1981, indicating that shipments of grease in barrels were picked up and hauled away from Ohio Barge Lines on these dates (N.T. 6/17/86, pp. 404-406). Mr. Toth stated that both of these shipments of grease were dumped into the demolition site and buried (N.T. 6/17/86, p. 404).

Earlier testimony by Dan Peterson indicated that only the Phase I pit – not the demolition site – was permitted to accept this type of industrially generated waste (N.T. 6/17/86, PP. 103, 107). Thus, the Commonwealth has met its burden of establishing beyond a reasonable doubt that the defendant disposed of solid waste in an area of his facility which was not permitted to accept such waste; and therefore, the defendant's argument is rejected as meritless.

(d) Counts Six through Forty-Nine – Disposal of Wastes from Conoco Coal Contrary to Defendant's Permit

The defendant contends that he had prior witten [sic] approval for the disposal of residual wastes from Conoco Coal.

Paragraph G of the defendant's permit (Commonwealth's Exhibit 2) states as follows:

> (g) Industrial Waste Disposal at Permitted Sites – Module 1 must be completed and submitted to the department for each and every waste which is proposed for disposal in the Phase I pit. Prior written approval must be obtained for the the [sic] disposal of each waste in the Phase I pit.

According to the testimony of Roy Scandrol, a mechanical services supervisor for Conoco Coal, Conoco Coal contracted with the defendant for the removal of residual wastes from a black water pond on Conoco's property (N.T. 6/17/86, pp. 238-240). The wastes were removed between December 9, 1981, and January 25, 1982 (See Commonwealth Exhibits 17-E through 17-VV).

The testimony of Dan Peterson indicated that the defendant received a Module 1 approval from the DER for the disposal of residual wastes from Conoco in September, 1982 – approximately eight months after the disposal project had been completed (N.T. 6/27/86, p. 150). Thus, at the time the defendant hauled the wastes and disposed of them at his MIDC facility, his existing permit did not allow the disposal of this waste from this generator (i.e., Conoco Coal). Accordingly, the Commonwealth has established its charge that the defendant acted contrary to his permit in accepting this residual waste.

We note that we have considered and rejected the defendant's argument that prior approval for similar coal wastes from other generators satisfied the permit requirements. Paragraph G of the permit is very clear that the permittee must obtain prior approval for "each and every waste" proposed for disposal. It does not say 'each and

every waste that is not similar to a waste previously approved.'

(e) Counts Fifty and Fifty-One – Possession of a Permit for Wastes from U.S. Steel-Edgar Thompson Works

The defendant alleges that he possessed the necessary permit for disposal of wastes from U.S. Steel-Edgar Thompson Works (USS-ET).

Dan Peterson testified that he searched the DER records and found no Module 1 approval for the Phase I pit for the disposal of grease boxes from USS-ET (N.T. 6/17/86, P. 155).

David Ross stated that in December, 1981, a load of grease was hauled from USS-ET and dumped into the Phase I pit. Mr. Ross stated that the defendant told him not to tell anyone at USS-ET that they did not have a permit to haul this grease (N.T. 6/17/86, p. 460-461).

This testimony by the Commonwealth's witnesses establishes that the defendant did, in fact, permit the disposal of these residual wastes without having received prior DER approval via the submission of a Module 1 application. Thus, the defendant's argument to the contrary is meritless.

(f) Counts Fifty-Four and Fifty-Five – Disposal of Residual Wastes at an Alternate Location without a Permit

The defendant alleges that as he did not own the property at this alternate location in Rostraver Township,

Westmoreland County, he was not required to have a permit to dispose of wastes there.

The evidence of disposal of lime wastes at this location in Rostraver Township (referred to as "the Fedorka farm") was provided via the testimony of former employees David Ross, William Baird, and Eustace Walters. Mr. Ross testified that the defendant told him to dump the lime and sewage ash which had been hauled from McKeesport Sewage Treatment Plant at the Fedorka farm in Rostraver Township, Westmoreland County (N.T. 6/17/86, pp. 461-462). Both Mr. Baird and Mr. Walters testified that they were truck drivers and they dumped loads of lime/sewage ash at the Fedorka farm (N.T. 6/17/86, pp. 429, 537).

Our evaluation of the defendant's argument, which is supported by neither statutory nor case authority, leads us to the conclusion that it is without merit. To find otherwise would be ostensibly to condone the defendant's dumping of wastes on another person's property and thereby insulating himself from criminal charges. The fact is, the defendant disposed of the waste without a permit to dispose of it at the location he designated for disposal. This is the gravamen of the crime.

(g) Lack of Adequate Evidence of Waste Discharge

The defendant alleges that the Commonwealth failed to present sufficient evidence that he actually discharged wastes.

Contrary to the defendant's assertion, the Commonwealth presented overwhelming evidence that the defendant actually discharged wastes. As indicated above, several of the defendant's former employees testified that they either witnessed or participated in the actual pumping of leachate from the Phase I pit into the tributary to the Youghiogheny River. In addition, and at least as significantly, the Commonwealth called Gregory Farrell, a professional engineer who was qualified as an expert. Mr. Farrell testified that he was assigned by his employer, Roy F. Weston, Inc., to calculate the level of materials that should have been in the Phase I pit on November 26, 1984 (i.e., the date that an aerial photograph – Commonwealth's Exhibit 29 – was taken), based upon the defendan 's manifests of what was dumped into the pit, eva, tion, water seepage, etc. According to Mr. Farrell's calculations, as of November 26, 1984, the pit should have contained 53,082 cubic yards of waste and water (N.T. 6/17/86, p. 574). In actuality, according to Mr. Farrell, the actual amount of waste and water in the pit on November 26, 1984, was 47,111 cubic yards – a difference of 5,971 cubic yards or 1,205,903 gallons (N.T. 6/17/86, p. 575).

This testimony of the Commonwealth's expert in conjunction with the testimony of the defendant's employees convinced us beyond a reasonable doubt that the defendant did actually discharge wastes – both residual and hazardous – from the Phase I pit without a permit to do so. Accordingly, we find the defendant's argument to be meritless.

(h) *DeMinimus* Infraction

The defendant alleges that his actions in the present matter constitute, at best, a *deminimus* infraction of the applicable statutes due to the Commonwealth's failure to prove any actual pollution, and, therefore, any actual harm.

We note initially that the defendant was not specifically charged with the provisions of the Solid Waste Management Act and the Clean Streams Law concerning pollution. Thus, the Commonwealth was not required to prove any instances of pollution to establish every element of the crimes with which the defendant was charged and convicted.

However, putting this aside, we find that the defendant's willful and intentional actions in this matter are far from *deminimus* in nature. Rather, they are major violations of very important legislation promulgated to protect not only each one of us, but the flora and fauna which enrich our lives and environment. The defendant's wanton interference with our environment is deplorable and for us to excuse it as *deminimus* would be, in effect, a judicial endorsement of this conduct.

VIII.

Finally, the defendant alleges that the sentence we imposed is illegal and excessive.

On April 10, 1987, we sentenced the defendant to serve a total period of incarceration of not less than six years nor more than twelve years, a concurrent twenty-five year period of probation, and a fine of $200,000.

Regarding the legality of the sentence, the defendant appears to allege that the sentence is illegal because the defendant was wrongfully convicted based on the reasons set forth in his post-trial motions. This is not the basis for assessing the legality of a sentence. Rather, the legality of a sentence concerns considerations such as exceeding the statutory limit, failing to merge certain offenses, failing to state adequate reasons on the record, etc. None of these considerations is present in the within case. Our sentence is well within the statutory limits and we gave several reasons for imposing this specific sentence. Accordingly, we believe that our sentence is lawful and appropriate.

The imposition of sentence is within the sound discretion of the sentencing judge. *Commonwealth v. Jackson*, 336 Pa. Super. 609, 486 A.2d 431 (1984). A sentencing court does not abuse its discretion unless it: (1) erroneously applies the guidelines, (2) imposes a sentence within the guidelines that is "clearly unreasonable," or (3) imposes a sentence outside the guidelines which is "unreasonable." *Commonwealth v. Drumgoole*, 341 Pa. Super. 468, 491 A.2d 1352 (1985); 42 Pa.C.S.A. §9781(c).

Further, a sentence must either exceed the statutory limits or be manifestly excessive to constitute an abuse of discretion. *Commonwealth v. White*, 341 Pa. Super. 261, 491 A.2d 252 (1985). "A sentencing judge's discretion must be accorded great weight as he is in the best position to weigh various factors such as the nature of the crime, the defendant's character, and the defendant's displays of remorse, defiance, or indifference." *Commonwealth v. Fries*, ___ Pa. Super. ___, 523 A.2d 1134 (1987).

As required at the time of this sentencing, we consider the sentencing ranges as set forth in the Sentencing Guidelines. In rejecting these guidelines, we stated on the record several reasons for our sentence.

First, the defendant was convicted of several serious violations of the Solid Waste Management Act (SWMA). In addition, the defendant was convicted of committing perjury in connection with a proceeding before the Commonwealth Court.

Secondly, rather than sentencing the defendant to consecutive periods of incarceration on all or most of the individual counts of which he was convicted, we sentenced him to a period of incarceration on only three counts which dealt with totally separate incidents.

The defendant was convicted of sixty counts of violating criminal sanctions of the Solid Waste Management Act and other criminal statutes. We sentenced the defendant on only three of these counts. At Count 1 (Trial 1) (original Count 5), we sentenced the defendant to a period of incarceration of two and one-half to five years and ten years probation. The gravamen of this Count was the deliberate alteration of the groundwater monitoring system which risked the seepage of hazardous wastes into the aquifer. At Count 5 (Trial 1) (original Count 10), lying under oath before the Commonwealth Court, we sentenced the defendant to a consecutive period of incarceration of one to two years and five years probation. At Count 2 (Trial 2) (original Count 2), we sentenced the defendant to a further consecutive period of incarceration of two and one-half to five years and ten years probation. The gravamen of this Count was the above-ground

pumping of hazardous wastes into an unnamed tributary of the Youghiogheny River. The total sentence imposed was a period of incarceration of six to twelve years. In addition, we ordered the defendant to pay the following fines: $100,000 at Count 1 (Trial 1), and $100,000 at Count 2 (Trial 2).

Thirdly, we disagree strongly with the defendant's contention that his crimes were "victimless." Rather, we are all, at the very least, potential victims. The evidence demonstrated convincingly that the defendant willfully discharged over a million gallons of hazardous waste and residual wastes into a tributary of the Youghiogheny River. We will never know the extent of the harm caused, but it is absolutely clear that this conduct threatened serious harm.

Fourthly, the defendant's actions demonstrate that he had absolutely no concern whatsoever for the citizens who live in the area of his disposal facility. His behavior in dumping both hazardous and residual wastes into our waterways shows a complete indifference toward his fellow citizens. In fact, his behavior rises to the level of callous disregard for the health and safety of his neighbors and their environment.

Fifthly, the defendant's behavior was not inadvertent and unintentional. Rather, his behavior in subverting the safeguards put in place to protect our environment by diverting the discharge from the 810 pipe was intentional and wanton.

Finally, in our opinion, the defendant is a very dangerous man. He has engaged in behavior which poses a serious risk to the health and safety of the community by

deliberately discharging hazardous wastes into an unnamed tributary of the Youghiogheny River. Also, he altered the monitoring system in such a way as to risk the danger of the discharge of hazardous waste into the aquifer.

We find that the defendant's behavior is reprehensible and to impose a less severe sentence than the present one would be to condone this abhorrent conduct. Accordingly, we believe that the sentence imposed herein is neither unlawful nor an abuse of our discretion, nor excessive under the circumstances.

Conclusion

For the foregoing reasons, we find that the defendant is not entitled to a dismissal of the charges, an arrest of judgment, a new trial, and/or a reduction in his sentence.

/s/ Novak, J.
NOVAK, J.

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

NO. 485 PITTSBURGH 1988

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM FIORE,
APPELLANT

BRIEF FOR APPELLANT

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, CRIMINAL DIVISION, C.C. NO. 8508740 AS ENTERED APRIL 10, 1987

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Opinion

* * *

STATEMENT OF THE QUESTIONS INVOLVED

1. Was Rule 1100 Violated By The Commonwealth And Did The Court Err In Granting The Commonwealth's Petition To Extend?

   Answered in the negative below.

2. Whether Section 606 Of The Solid Waste Management Act Is Unconstitutional And Its Application Unconstitutional?

   Answered in the negative below.

3. Whether There Was An Unconstitutional Delegation Of Authority To Authorize An Administrative Agency Or Its Personnel To Define Crimes In Rules And Regulations And Permit Terms And Conditions And Whether The Delegated Authority Was Unconstitutionally Exceeded?

   Answered in the negative below.

4. Whether The Statute Of Limitations In the Solid Waste Management Act Is Unconstitutional And Whether This Prosecution Is Barred By The Applicable Statute of Limitations?

   Answered in the negative below.

5. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 401(a), A Felony 2 Under Section 606(f) – (Count One, Trial One)?

   Answered in the negative below.

6. Whether The Evidence Is Insufficient To Support A Verdict of Guilty Of Violation Of The Clean Streams Law, Section 301, 307, A Misdemeanor 3 Under 35 P.S. 691.602(b), 18 Pa.C.S. 306 – (Count Two, Trial One)?

   Answered in the negative below.

7. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 401(a), A Felony 2 Under Section 606(f) – (Count Three, Trial One)?

   Answered in the negative below.

8. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 302(a), A Misdemeanor 3 Under Section 606(f) – (Count Four, Trial One)?

   Answered in the negative below.

9. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Perjury, 18 Pa.C.S. §4902, A Felony 3 – (Count 5, Trial One)?

   Answered in the negative below.

10. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Obstruction Of Justice, 18 Pa.C.S. §5101, A Misdemeanor (Count Six, Trial One)?

    Answered in the negative below.

11. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Conspiracy, 18 P.a.C.S. 903, (Count Nine, Trial One)?

    Answered in the negative below.

12. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Clean Streams Law, Section 301, 307, A Misdemeanor 3 Under Section 602(b) – (Count One, Trial Two)?

    Answered in the negative below.

13. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 401(a) A Felony 2 Under Section 606(f) – (Count Two, Trial Two)?

    Answered in the negative below.

14. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Violation Of The Solid Waste Management Act, Section 302(a), A Misdemeanor 3 Under Section 606(b) (Count Three, Trial Two)?

    Answered in the negative below.

15. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Two Counts Of Violation Of The Solid Waste Management Act, Section 501(a), A Misdemeanor 3 Under Section 606(b) – (Counts Four and Five, Trial Two)?

    Answered in the negative below.

16. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Forty-Five Counts Of Violation Of The Solid Waste Management Act, Section 302(a), A Misdemeanor 3 Under Section 606(b) – (Counts Six Through Forty-Nine, Trial Two)?

    Answered in the negative below.

17. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Two Counts Of Violation Of The Solid Waste Management Act, Section 301, A Misdemeanor 3 Under Section 606(b) – (Count's Fifty And Fifty-One, Trial Two)?

    Answered in the negative below.

18. Whether The Evidence Is Insufficient To Support A Verdict Of Guilty Of Two Counts Of Violation Of The Solid Waste Management Act, Section 301, A Misdemeanor Under Section 606(b) – (Count's Fifty-Four And Fifty-Five, Trial Two)?

    Answered in the negative below.

19. Whether The Charges Should Be Dismissed As De Minimus Infractions Pursuant to 18 Pa.C.S. §312?

    Answered in the negative below.

20. Whether The Attorney General Lacked Authority To Investigate And Prosecute This Case?

    Answered in the negative below.

21. Whether The Multi-County Investigating Grand Jury Lacked Jurisdiction And Proceeded Unlawfully In Making A Presentment Against Appellant?

    Answered in the negative below.

22. Whether The Sentence Of The Court Is Excessive?

    Answered in the negative below.

• • •

V. APPELLANT HAD THE NECESSARY PERMITS

A. SWMA Facility Permit

On March 24, 1980 Appellant received a solid waste disposal facility permit from the DER. Permit No. 300679 was issued to Appellant for the site in question and was in effect until suspended by the DER in Fall 1983. The evidence of violations here relate to times when the permit was in effect. See Commonwealth Exhibit No. 2 (both trials) – attached to this brief.

The second degree felony charges on which Appellant was convicted and sentenced are alleged violations of the Solid Waste Management Act Section 401(a), which reads as follows:

> "(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the Department; *no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the Department;* and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the Department." (Emphasis added.)

The word "permit" is not defined in Section 103, the definitions section, or anywhere else in the Act. A review of the Act in general makes it clear that the "permit" in

this situation refers to the document by which a person comes under the jurisdiction of the DER as the owner and operator of a site where solid waste is disposed. The permit issued to Appellant is entitled "Permit for Solid Waste Disposal and/or Process Facility." It designates the site and the facility permitted upon that site to be used for disposal of hazardous waste. A person operating a site for this purpose has one permit. SWMA Section 606(f) classifies a violation of 401 as a felony of the second degree. Actions alleged to be contrary to a permit are dealt with under paragraphs (a) and (b) of Section 606 as summary offenses and misdemeanors. Obviously, the legislative intent was to make it a felony for someone to engage in this business who had not brought themselves under the jurisdiction and supervision of the law and the regulating agency.

Count 1 and Count 3 in Trial One regarding the pipe and Count 2, Trial Two regarding pumping are charged as violations under Section 401(a) and thus as felonies of the second degree. They all state that Appellant "did some act without having first obtained a permit from the DER for such disposal facility." It is clear in the language of the charges that the permit being referred to is the permit for the facility, not any other type of license or approval which might be required by regulation or otherwise.

The prosecution used the word "permit" throughout the trial without definition and interchangeably with such words as "approval" and "license" for the purpose of trying to stretch this case into a felony case. The charges under Section 401(a) must fail for this obvious reason.

In Trial One, the Court instructed the jury that they could consider as fact the question of whether Appellant had so significantly departed from the terms of the permit that the operation of the facility then became an unpermitted operation. This jury instruction is discussed as a separate issue in this Brief. The Statutory Construction Act and all reasonable rules of construction lead to only one reasonable conclusion. Appellant had a permit. The permit referred to in SWMA Section 401(a) is the kind of permit that Appellant had. The Commonwealth can allege that Appellant violated his permit and go about proving violations or actions contrary to the permit, but here the prosecution has distorted the language and scheme of the statute.

The term "permit" is nowhere defined in the SWMA. To extrapolate a definition of "permit" as intended by the legislature under the SWMA one must refer to permit application requirements at 35 P.S. 6018.502(a). In this section it becomes clear that a permit is a single document issued upon application that included plans, designs and other relevant data prepared by a registered professional engineer. The permit clearly applies to a whole facility as indicated in 502(b) in requiring that a form be recorded at the office of recorder of deeds. It is further indicated that a permit is a single document in that it requires a bond and is issued only one time.

The Code at 25 Pa.Code 75.260 defines a permit as a written document issued by the Department under the Act which authorizes the recipient to undertake the treatment, storage or disposal of hazardous waste under the act. The term does not include interim status or a permit

which has not been subject to final action, such as a draft permit or a proposed permit.

Interim status was a program developed to accommodate waste disposal during the interim period until new hazardous waste facilities could be developed. Pub. L. No. 96-482 § 7, 29, 94 Stat. 2336, 2349. To qualify for interim status an operator had to notify the Department of the location and description of such activity and the identified or listed hazardous wastes handled by such person. Not more than one notification shall be required to be filed with respect to the same substance. 35 P.S. 6018.501. The transition scheme or interim status is described at 35 P.S. § 6018.404. To qualify, a facility had to be in existence on the effective date of the act; it had to comply with 501 already discussed; it had to make an application for a new permit under the act; and had to operate in a manner consistent with the objectives of the act. If these requirements were satisfied the facility was treated as having a permit until final departmental action on such application is made. It should also be noted that the SWMA included the savings clause in Chapter 29 stating:

> Section 1001 of Act 1980, July 7, P.L. 380, No. 97, provides: "The act of July 31, 1968 (P.L. 788 No. 241), known as the "Pennsylvania Solid Waste Management Act," is hereby repealed: Provided, however, that all permits and orders issued, municipal solid waste management plans approved, and regulations promulgated under such act shall remain in full force and effect unless and until modified, amended, suspended or revoked."

In this case Appellant possessed Permit No. 300679 issued on 3-24-80 for the operation of the Phase I industrial waste pit. (R.213). The new SWMA became effective on September 7, 1980. The DER did not obtain primacy in environmental matters until January 1986 under the Federal Resource Conservation and Recovery Act (RCRA). 51 Fed. Reg. 1791 (Jan. 15, 1986). Prior to that time the Environmental Protection Agency (EPA) maintained jurisdiction over disposal sites. In this regard Appellant promptly satisfied the interim status requirements of both the SWMA and RCRA by notifying the proper authorities and submitting a Part A application. Appellant continued under interim status until August 4, 1983 when his 1980 permit was suspended by DER.

Appellant enjoyed two distinct authorities to operate under the SWMA. The first is that his 1980 permit remained in full force and effect under the "savings clause" of the SWMA until it was suspended on August 4, 1983. The second was the interim status he obtained under 35 P.S. 6018.403 of the SWMA which requires that he shall be treated as having been issued a permit. Consequently, all counts alleging that Mr. Fiore operated a waste disposal facility without a permit must fail because he had the ONLY permit or interim authority that could be obtained under the SWMA for such facility.

Appellant also possessed several different permits to discharge industrial wastes issued under the Clean Streams Law, 35 P.S. 691.1 et seq. The permits in force during the time period in question were: #0046663 (issued April, 1979; expired April, 1984), "0091715 (issued October, 1980; expired October, 1985), #00466655 (issued April, 1979; expired April, 1984), and #PA0046655 (issued

December, 1983; expired April, 1984). The more recent permit consolidated the prior three. (R. 2095-2114).

B. Clean Streams Law Permits

The National Pollution Discharge Elimination System (NPDES) permits were issued for various discharge points located on the site. This case has made several references to a manhole. (R. 249-251). The discharges from this manhole were permitted by NPDES permit numbers: PA0046663 or PA0046655 (2g & 2h). As verified by Sam Harper, Department of Water Quality, Bureau of Water Quality Management, water quality specialist supervisor, Site B's 1983 permit included outfalls 005 (PA0091715, Outfall 001, 1980), 006 (PA0091715, 002, 1980), 007 (711 in manhole, 011 in PA0046663, 1979), 008 (810 in manhole, 010 in PA0046663, 1979). (R. 469).

The pipes in the manhole were consistently referred to as 711 and 810 throughout the trials. This terminology is a clear misnomer because pipes, in and of themselves, are not permitable under the Clean Streams Law. It is the discharges for which Clean Streams Law permits (NPDES) are issued. These discharges are permitted at a certain point. In this case, into the manhole pipe leading to the unnamed tributary of the Youghiogheny River. The discharges into the unnamed tributary were permitted and the counts brought under the Clean Streams Law must fail.

It should be added that many of the charges against Appellant allege that he disposed of hazardous or residual wastes by above ground pumping without a permit in

violation of the SWMA. There is only one type of permit issued under the SWMA. This is a permit to operate a disposal facility. Mr. Fiore possessed such a permit #300679 issued on 3-24-80 and was also on interim status. Any discharges that may have occurred from the facility would have to be permitted under the Clean Streams Act. As has already been discussed the NPDES permits were directed toward such discharge. As a result, the charges alleging disposal by pumping must fail under the SWMA since no other permit exists or can be obtained under that statute.

The Commonwealth has argued that the existence of a permit does not constitute a defense because (1) permits are issued according to design plans and specifications submitted with the application and (2) the activity was so outside the scope of the sanctioned activity that the appellant, in effect, had no permits.

First, the SWMA specifically requires one disposing of waste to "first obtain a permit." 35 P.S. 6018.501. Once a permit is issued, the facility may continue to operate under that permit until action by the DER to suspend or revoke it for various reasons. 25 Pa.Code § 75.278. The Commonwealth concedes that the DER has exclusive authority to revoke permits and that this authority may not be usurped by judge or jury. A variation from the plans or designs may warrant a revocation but activity done prior to the revocation is done with a permit. All activity in this case was done prior to the permit being suspended or revoked.

Second, a permit under the SWMA is issued for a "facility." 35 P.S. § 6018.301, 401. A facility is defined as

all land, structures and other appurtenances or improvements on a property where waste is treated, stored or disposed. 25 Pa.Code § 75.260. Any activity conducted at such facility while validly permitted is conducted with a permit. However, where the activity is outside or off the facility, it is not permitted under the particular SWMA permit. The only activity alleged to have occurred off the permitted facility is related to the lime and sewage used as fertilizer on a sod farm. (Trial Two, Counts 54 and 55). All other activity was conducted at the permitted facility while properly permitted.

Consider an analogy of one licensed to operate a motor vehicle. A vehicle operator may commit a serious offense, e.g. homicide, while operating the vehicle. This individual may certainly be charged with that serious offense, but may not be charged or convicted of operating a vehicle without a license. This hypothetical person may be punished by revoking or suspending his license but he *cannot* be convicted ex post facto of operating the vehicle without a valid license. This same reasoning applies here. The appellant had a SWMA permit to operate the facility and may not be convicted of operating it without a permit.

Finally, the Commonwealth confuses the application of permits issued under the Clean Streams Law with those issued under the SWMA. The sole authority on which the Commonwealth relies for the proposition that activity outside the scope of permit is, in essence, without a permit is *DER v. Fleetwood Borough Authority*, 21 Pa. Commonwealth Ct. 349, 346 A.2d 867 (1975).

It is fully understood that the Clean Streams Law permits apply to a "point source" discharge. *Fleetwood* was under the Clean Streams Law which applies exclusively to discharges and effluent limitations. That decision ignores Section 307(c) of the Clean Streams Law which recognizes discharge "contrary to the terms of a permit." That as opposed to discharge without a permit. Appellant always had a permit for discharge. Conversely, the SWMA permit applies to a whole facility. § 6018.301, 401. It authorizes disposal operations. Accordingly the Applicant was permitted to and did operate the facility after obtaining a permit.

In summary, Appellant possessed a SWMA permit to operate the facility and the necessary NPDES permits to discharge industrial waste under the Clean Streams Act. No other permits were required or could be obtained under the SWMA. Consequently, all counts based on the SWMA having as an element the doing of an act without a permit must fail.

For this reason alone, all counts alleging that Appellant acted without a permit (Counts 1, 2, 3 and 4 of Trial One and all Counts of Trial Two) must be dismissed.

VI. ALL CHARGES SHOULD BE DISMISSED AS DEMINIMUS INFRACTIONS UNDER 18 Pa.C.S. § 312(a).

All of the charges should be dismissed as *Deminimus infractions* under 18 Pa.C.S. § 312(a).

The statute reads as follows:

> (a) General Rule – The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of attendant circumstances, it finds that the conduct of the defendant:
>
> > (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
> >
> > (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
> >
> > (3) presents such other extenuations that it cannot reasonably by [sic] regarded as envisaged by the General Assembly or other authority in forbidding the offense.

The statute does not create discretion in the Court. It says, "The court *shall* dismiss a prosecution . . . " The statute mandates dismissal upon any one of certain findings being made on the charges, the evidence and the circumstances.

In *Commonwealth v. Gennelli* 474 A.2d 294, 326 Pa.Super, 388 (1984), in reversing the trial court's dismissal of charges, Judge Johnson nevertheless rejected the Commonwealth's argument that the trial court erred by sua sponte raising the deminimus issue, as follows:

> The Commonwealth's first argument concerning this issue is meritless, as neither the statute nor

> case law requires a defendant to preserve the issue of de minimus infractions by means of inclusion in an omnibus motion. On the contrary, the language of the statute *requires* the trial court to dismiss the prosecution on its own accord, upon a determination that the defendant's conduct involved de minimus infractions. (Emphasis added).

The court must dismiss a prosecution if it finds that the charge falls into the statutority [sic] defined "de minimus" category. See *Commonwealth v. Kindness*, 371 A.2d 1246, 1250, N.5, 247 Pa.Super. 99, 107, N.5 (1977) (dictum).

The law defines "de minimus" in three separate numbered categories. If the case falls into any one of these, the court is required to dismiss it.

Appellant submits that dismissal of all charges in this case is dictated under each of the three paragraphs.

Appellant submits that this court should find that the trial court erred and now order all charges dismissed.

Due to the mandatory language and the absence of a limitation on the mandate, it appears that this appellate court may and should directly judge the case on the record presented without limitation to a test of review of the trial court's action. In any case, since the statute is mandatory, and not discretionary, the test is not the trial judge's abuse of discretion.

All of the charges in this case relate to activities under the Solid Waste Management Act (35 P.S.

§ 6018.101 et seq.) and the Clean Streams Law (35 § 691.1 et seq.).[1]

The common purpose of these regulatory statutes, simply stated, is protection of the environment and prevention of pollution.[2]

The conduct complained of in this case did not harm the environment, did not cause any pollution, and did not create threat of it. No substantive law was violated.

In broad terms, the convictions are based on three types of technical violations: (1) alteration of an underground pipe which was not connected to the hazardous waste disposal pit, was not required as part of the construction of the pit, was a mine drainage disposal pipe and by regulation could not be part of the groundwater monitoring system;[3] (2) pumping water from the top (of the pit, of which water no analysis was submitted) for the purpose of complying with the Permit;[4] and (3) accepting

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[1] These are some charges brought under the Crimes Code which are based on or related to the cited laws.

[2] See 35 P.S. § 691.4 and 6018.102.

[3] DER Regulatioins, [sic] 25 Pa.Code § 75.264(n)(4) states the requirements for the groundwater monitoring system which consists of monitoring *wells* and provides for the construction of an alternate and innovative monitoring system only where site conditions preclude the installation of monitoring *wells*.

[4] See Commonwealth's Exhibit No. 1 (Trial 1), Solid Waste Disposal Facility Permit No. 300679, paragraph 6(h), page 7 (in part); "Leachate shall not be allowed to accumulate in the pit to a depth greater than two (2) feet." (Copy attached to this brief.)

wastes without having first received separate specific approval each time.[5]

Paragraph (2) of Section 312 of the Crimes Code makes dismissal hereunder contingent on findings that conduct "did not *actually* cause or threaten the harm or evil sought to be prevented by the law defining the offense" or was "too trivial to warrant the condemnation of conviction."

This was a fledgling industry in the subject years of the early 1980's. Previously, there were few restrictions on disposal of industrial wastes, which were routinely buried on industry-owned property or just tossed in a garbage dump. (R. 285).

Appellant, who had been in the trucking business, hauling mostly for industry, purchased and developed a 600 plus acre site, obtained a fly-ash disposal permit in 1979 and began that operation, then obtained amendment to his facility permit for demolition disposal in another area of the site and for the Phase I Industrial Waste Pit in a different area of the original site permit area and began to operate them. The Phase I pit was permitted for hazardous waste. (He also commenced construction of larger Phase II Industrial Waste Pit, which has never been allowed to be used.) Appellant coordinated the operation of transportation and disposal of the industrial wastes of such large waste generators as U.S. Steel Corporation.

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[5] See SWMA, Section 501(c), 35 P.S. § 6018.501(c), (in part); "Not more than one such notification (to the department) shall be required to be filed with respect to the same substance." (Emphasis added.)

The nature of the conduct charged viewed with the attendant circumstances does not warrant condemnation of conviction.

How can the court determine this question in such a case? It seems that the first step should be a review of the nature of the conduct.

None of the charged conduct was criminal in nature. None is *malum in se*. None is even *malum prohibition*. Assuming for argument that they were violations, they were that only because they were done without specific permission or with permission obtained late.

None of the charged conduct directly violated a statute. It is rather a violation of a permit condition or an agency regulation.

First, Appellant caused an underground pipe to be altered. That is not charged as an offense itself, but seven counts in Trial One were developed by the prosecutor out of that act.

The upshot of the pipe alteration actually was prevention of possible pollution by stopping the mine drainage collected in the pipe from entering the "tributary."

Second, the pumping of water from the top of the pit was known to him and may have been done with Appellant's approval. For the purpose of this *de minimus* consideration, it is most important to know that Appellant's permit would be violated if the rainwater level on top of the pit were permitted to exceed two feet. A *crime* to remove the water, a *crime* to *not* remove the water.

More important to note is that there was water in the pit. Appellant's pit didn't leak. His pit was state-of-the-

art and was said by a DER official in trial to be the best waste pit in this region. In the early process, no good way of disposing of excess rainwater from the pit had been found.

Third, DER felt Appellant should have filed more Module 1's for approval of waste streams. In Trial Two, Counts 4-51, 54 and 55 concern this. See revised information for Trial Two (R.1561).

Counts 4 and 5 concerned non-hazardous waste being grease barrels from Ohio Barge Lines. The charge is disposal without a permit. That charge is wrong and a Module 1 was not even required since it was non-hazardous.

Counts 6-49 are 44 charged violations, one for each truck, from Conoco Coal Research Division coal waste, being mostly "coal fines." DER approved the Module 1 after the waste was deposited in Appellant's pit. The application was made only because Conoco's lawyer insisted out of caution. It was never necessary. It was residual waste only.

Counts 50 and 51 concerning roller grease from U.S. Steel (Edgar Thompson Works) suggest that Appellant should have a "permit." The court relied on its opinion on testimony re Module 1's. (See Opinion, p. 64). Appellant had a "permit." This was residual waste and no Module 1 was required.

Counts 54 and 55 charge Appellant with operating a residual waste facility in Rostraver Township. He wasn't required to have a permit since he wasn't the owner or operator of a facility there. This was actually in the nature

of a resource recovery project in that the owner Wayne Fedorka and Bill Fedorka were paying Appellant's drivers to deliver lime from U.S. Steel and sewage sludge from McKeesport Sewer Authority for use as fertilizer on a "sod" farm. (R.189).

Commonwealth witness Daniel Peterson, Operations Supervisor of the Pittsburgh Region of the Bureau of Solid Waste Management (DER), testified on cross-examination in Trial One:

> Q. " . . . and violations are something that occur on every waste site in Pennsylvania regardless of how careful you are; aren't they.
>
> A. There is usually some violations found. (R. 339)

The same witness had admitted that in the same years of 1980, 1981 and 1982, DER was permitting hazardous waste to be disposed of in garbage dumps:

> Q. All right. During that time, isn't it a fact that the state of the art was such – and I'm talking about 1980, 1981, and 1982, isn't it a fact that the state of the art was such that you didn't even require pits like Mr. Fiore's, but you permitted hazardous wastes to be disposed of in garbage dumps?
>
> A. The regulations specifically allow for a municipal landfill under interim status to accept hazardous waste.
>
> Q. Now, this specific situation, during this time period, there was a hazardous waste disposal site where you permitted the disposal on a garbage dump; is that correct?

> A. The facility had interim status, yes.
>
> Q. And the process by which that disposal was undertaken, it wasn't disposed of in a facility like Mr. Fiore's where you had a clay-lined pit, it was simply mixed with garbage and buried, is that correct?
>
> A. This was placed in with the garbage, covered, and there was also a leachate collection system. (R.285-286)

Appellant's permit to operate the solid waste disposal facility was suspended in Fall 1983. Indeed, the violations charged didn't warrant that, but certainly when viewed for criminal prosecution these matters should be found to be de minimus. If Appellant violated his permit as charged, the administrative action against the permit was the remedy, not a felony criminal prosecution based on technical violations.

Appellant submits that Paragraph (2) of Section 312 is fully applicable here. Paragraphs (1) and (3) are also fully satisfied here based on the above discussions.

The evidence, the nature of the charges and the attendant circumstances do require a conclusion in favor of dismissal under Section 312.

VII. THE TRIAL ONE EVIDENCE IS INSUFFICIENT ON ALL COUNTS RE THE ALTERED PIPE

All of the counts of Trial One arise from the alteration of a pipe on Appellant's solid waste disposal site. Ironically the alternation [sic] of the pipe is not charged as an offense.

Count 1 charges that Appellant operated his hazardous waste disposal facility without a permit for the facility after the pipe was altered.

Count 2 charges that Appellant discharged industrial wastes without a discharge permit after the pipe was altered.

Count 3 charges that Appellant operated without a permit for the facility after the pipe was latered [sic] because the pipe was then an "unpermitted pipe system" disposing of hazardous waste leachate.

Count 4 charges Appellant operated a residual waste disposal facility contrary to his permit for the facility after the pipe was altered in disposing of residual waste through an unpermitted pipe system.

Count 5 charges Appellant with perjury in testimony in court regarding the alteration of the pipe.

Count 6 charges Appellant with obstruction of justice by the alteration of the pipe.

Count 9 charges Appellant with conspiracy with an employee regarding the alteration of the pipe.

The facts relevant to all of these counts are as follows:

Appellant obtained a DER permit (Com. Exh. No. 2, Trial One, attached to this brief) for the operation of a solid waste disposal facility. That Permit (No. 300679 issued 3/24/80) allwed [sic] the disposal of industrial wastes within an area designated as Phase I Industrial Waste Pit. The definition of "Industria" waste includes hazardous, residual and municipal wastes. Appellant's

facility was a double-lined clay pit having monitoring wells in accord with agency regulations for the purpose of permitting the monitoring of underground water. In addition it had a 4" pitliner monitor perforated pipe surrounding the pit at its base to monitor pipe leaks, which emptied into a tank. In addition, Appellant had placed an underground mine drainage pipe to collect drainage from an outlying mine, carry it by and under the waste pit and empty into a small creek referred to as "tributary" to the Youghiogheny River. This pipe is referred to as the "810" pipe. It was not essential to construction, operation or monitoring of the pit. It was listed in the Permit by DER as a "monitoring point." There was also another underground pipe that relocated a small underground stream which actually became the "tributary." This pipe is referred to as the "711" pipe. The 711 and 810 pipes at a downgradient from the pit both emptied into an open manhole constructed by Appellant where their [sic] flows mixed and entered another pipe which a few feet away flowed into the "tributary." Appellant held NPDES permits under the Clean Streams Law for discharge from the facility to the tributary of the Youghiogheny River including from pipes 711 and 810. In Fall 1982 a DER employee claimed to notice "organic odors" in the area of the manhole. His samples of the outfall of pipe 810 in the manhole showed traces of contaminants in the "mine drainage," measured few "parts per billion." No contaminants appeared in the collection tank from the 4" pit liner monitor perforated pipe surrounding the base of the pit. No contaminants appeared in the groundwater monitoring system wells. Without taking samples from the mine, DER suggested

that, since the traces had some characteristics consistent with wastes disposed in Appellant's Phase I pit and the contingent temporary pit, one of the pits was leaking. Appellant was also advised that he would have to stop the flow of the 810 water. In early 1983, Appellant was required to sign a Consent Order and Agreement calling for drastic changes in Appellant's plan for development of the site including the completion of the Phase II pit. This action was required based on the traces at pipe 810. In Summer 1983, Appellant caused a concealed alteration to the 810 pipe desinged [sic] to control the flow of the mine drainage water out of the 810 pipe into the manhole. It caused the flow to be reduced through a 2" elbow which had a shut off valve which could be controlled by a long arm running up to the ground surface. Steps were taken to conceal the alteration including running a small concealed transfer pipe so some of the water from the 711 pipe would run out of the end of the 810 pipe. With an open valve the mine drainage water would flow out of the 810 pipe. With a closed valve, the 810 pipe water would not flow and only transfer water from 711 would flow out of the end of 810. The only evidence regarding activity of the valve was given by Tracy Opfar, a part-time employee of Appellant and sone [sic] of Teeter Opfar, deceased employee. Tracy Opfar testified that he saw his father move the rock covering a cap and insert a tool which he thought turned a valve and he heard a little more water running. (R. 630). There was testimony that Appellant was present during some of the time of the construction of the pipe alteration. There was no evidence regarding Appellant relative to the 810 pipe after the construction. In some proceeding which occurred before

the Commonwealth Court of Pennsylvania, Appellant apparently was questioned about the 810 pipe and gave responses which were judged false. The court read the questions and answers to the jury. The court declared a finding of materiality or a matter of law often revising a transcript which was not made part of the record. The record also does not contain evidence of the nature of the proceeding in Commonwealth Court.

Count One

Appellant Had a Permit

By considerable distortion of the language of the Solid Waste Management Act, the prosecution has brought this felony charge. Without charging violation of SWMA Section 401(a), this case is a misdemeanor case. To make it felonious, it had to be charged that Appellant did operate a hazardous waste disposal facility without *a permit for such disposal facility.* Count One suggests that some way upon the alteration of the pipe Appellant no longer had a permit for the disposal facility.

Jury Instruction

The court erred in instructing the jury in response to a jury question. (R. 1495-1497.) The jury obviously was confused by the issue of the permit. It asked "By law, does a permit violation automatically revocate or suspend that permit or must it be worded so in the permit?" This count should not have gone to the jury, but the court compounded the error by it [sic] instruction. The court

separated the question into two parts, answered negatively to both parts and then instructed that they could find that Appellant "so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation of a hazardous waste facility."

The court repeated this, "Secondly, was the violation or the alteration so substantial as part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit." Those are questions of fact for you to answer." (R. 1497.)

Appellant respectfully refers this Count to Section [sic] of this brief where the matter of the SWMA permit is discussed.

Further, Appellant submits that there is no precedent in American jurisprudence for such an instruction and the verdict returned upon it.

If one has a permit or license to do something, one may violate it and thus prompt suspension or revocation by the governing or regulatory authority.

Under the court's instruction here, if a person having a driver's license drove 80 mph in a 55 mph zone, upon pulling him over, a policeman could given [sic] him one citation for speeding and another for driving while his license were suspended or revoked, stating that a finder of fact will decide whether the violation was such as to cause an automatic suspension or revocation of the license.

The court told the jury that a permit violation does not automatically revoke or suspend the permit but then told the jury it could find that it did.

The alteration of the pipe at most was an action contrary to the facility permit as a violation of SWMA Section 302(a) and punishable as a summary offense or misdemeanor under Section 606(a) or (b).

Monitoring Pipes

Further, the allegation that there was "alteration * * * of its approved monitoring pipes" is incorrect under the regulations and the facts.

The applicable regulations establish the groundwater monitoring system for a hazardous waste disposal site at 25 Pa.Code § 75.264(n)(4).

The regulation states that the groundwater monitoring system *shall consist of monitoring wells,* at least one upgradient and those downgradient.

The regulations do not provide for "monitoring pipes" or "monitoring points."

The permit (page 6) Paragraph 6(c) stated a condition regarding the monitoring wells and then stated, "In addition to the wells listed above, the outfalls of the groundwater underdrain pipe and the 4" lines monitoring pipe are to be established as monitoring points." There was no evidence of official action taken to establish those.

The alteration of the pipe doesn't appear itself to be a violation of law, regulation or permit condition.

The charge and the verdict on Count One are contrary to law and evidence and must be reversed and dismissed.

Count Two

This charges that industrial wastes were discharged without a discharge permit and alleges that the discharge was leachate from the disposal facility.

The evidence is that Appellant always held NPDES discharge permits under the Clean Streams Law in addition to the SWMA Permit to operate the facility.

Solid Waste Permit No. 300679 applies to a whole facility as defined at 25 Pa.Code 75.260. A facility is all land, structures, and other appurtenances or improvements on a property where hazardous waste is treated, stored or disposed. Permit No. 300679 applied to 120 acres of the site including the area where the pipes were located. Further, the only permits issued under the Clean Streams Law are NPDES permits. Appellant retained NPDES permits No. 0046663 for pipe 810 and No. 00466655 for the same pipe. These permits applied continuously from 1979 to the present. The piping system and discharges were permitted under these three permits.

Appellant held a permit to discharge through pipe 810 which was a drainage pip [sic] from an outlying mine. That pipe was not connected to the disposal pipe, was not built as a pit monitoring pipe and was intended to run the mine drainage past the facility.

There was no evidence that the "traces" in the 810 pipe didn't come from the mine or some other source flowing into the mine.

Also there was no evidence regarding the pit liner monitoring pipe or the established monitoring wells regarding anything leaving Appellant's pit.

The Commonwealth had the burden of proof that Appellant (1) willfully and negligently (2) discharged leachage through (3) and unpermitted piping system.

There is no evidence of any of those elements.

If Appellant discharged anything through the 810 pipe it would have been under his NPDES permit. His alleged act was blocking the flow through 810.

There was no leachate. It must be proven to have come from the pit to fit that definition. There was no such proof. The evidence was to the contrary.

Appellant didn't discharge anything into a "water of the Commonwealth" since the water *in the mine* was already "water of the Commonwealth" which was merely redirected by a pipe for a distance. There was no evidence Appellant discharged anything into it.

Count Three

Again this is a felony charge under Section 401(a) for doing an act without a *permit for the disposal facility.* In addition, it charges discharge of leachate as under count two.

Count Four

This charge of discharge of residual wastes through pipe 810 without proof as if from the disposal pit.

This count would consider the existence of the facility permit and charge a violation of it as a misdemeanor by a discharge from the pit which is not supported by the evidence.

Count Five

This is the perjury count. The court declared "materiality" as a matter of law based on its revision of the transcript which was not made a matter of record. A review of that element cannot be made and the record thus does not contain evidence to support that finding.

The nature of the proceedings was not established in evidence. (The transcript regarding this count is found in the Supplemental Record.)

Count Six

Count six is the Obstruction of Justice alleging physical interference with a governmental function by altering the piping system. This crime specifically excludes the failure to perform a legal duty other than an official duty or any other means of avoiding compliance with law without affirmative interference with governmental functions. 18 Pa.C.S.A. 5101. The case law indicates that this offense has only been found when direct contact was made with an enforcement officer in his official duty or force was used. *Com. v. Saxon,* 275 A.2d 876 (Pa.Super. 1971).

The case law supports that direct physical force must be used upon the enforcement officer. In *Com. v. Farling,* 12 Dist. 732 (Dauph. 1903) the closing and hooking of a screen door was not an obstruction and to have that effect there must be a use of force, threats or power.

Mr. Shack, a DER enforcement officer, in testifying for the Commonwealth, stated that Appellant never argued with him, never chastised him, never raised his voice and never gave him a hard time. (R. 374). As a matter of fact, he stated about Appellant that "He met the approved design standards. He did what he was supposed to do, you kno, [sic] if he would have done it in the first place, there wouldn't have been any problem." The evidence indicates that Appellant never used force, threats or power and therefore this count must fail.

Count Nine

Count nine alleges a conspiracy with an employee to facilitate illegal disposal of hazardous wastes. No hazardous wastes were disposed of in violation of the SWMA or the CSL since the facility was properly permitted.

Since the activity was not illegal, the conspiracy count must fail.

* * *

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	NO. 00485 Pittsburgh, 1988
WILLIAM FIORE, Appellant	:	

Appeal From Judgment of Sentence April 10, 1987 In Court of Common Pleas, Criminal Division, Allegheny County, at No. CC8508740

BEFORE: CAVANAUGH, DEL SOLE and MONTGOMERY, JJ.

MEMORANDUM: FILED: May 12, 1989

The appellant, William Fiore, was the owner and operator of a waste disposal facility known as the Municipal and Industrial Disposal Company, located in Elizabeth Township, Allegheny County. In 1979, the company received a permit from the Commonwealth of Pennsylvania to dispose of various wastes, including hazardous wastes.

As a result of alleged unlawful disposal of waste, a multi-count indictment was presented against the appellant, charging over 150 violations of the Solid Waste Management Act[1] and related statutes. A co-defendant, David Scarpone, was also charged with some, but not all, of the offenses alleged against the appellant. As a result, a jury trial was held involving only charges which included the co-defendant and a separate non-jury trial was held

[1] The Solid Waste Management Act is found at 35 Pa.C.S. § 6018.101 et seq.

on the remaining charges which involved only the appellant. Both trials were held before Novak, J.

At the jury trial the appellant was convicted of disposing of hazardous wastes and operating a hazardous waste facility without a permit, discharging industrial wastes without a permit, disposing of residual wastes and operating a residual waste facility contrary to his permit, perjury, obstruction of the administration of the law, and criminal conspiracy.

The appellant was found guilty at the non-jury trial of similar offenses.[2] The appellant's post-trial motions were denied and he was sentenced to a total period of confinement of six to twelve years, concurrent probation for twenty-five years, and fines totalling $200,000.00. His petition to modify the sentence was denied and he has appealed to this court from the judgment of sentence.

The appellant has raised twenty-two issues on appeal, all of which were covered in the comprehensive and analytic opinion of Novak, J. of the court below.[3] We

[2] The trials in the court below were lengthy and the Notes of Testimony exceeded 2,200 pages.

[3] The twenty-two issues raised in the Statement of Questions Involved covered three pages and were over 70 lines in length. Pa.R.A.P. provides:

> Rule 2116. Statement of Questions Involved.
>
> (a) General rule. The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. It should not ordinarily exceed 15 lines, must never exceed one page, and must always be on a separate page, without

affirm on the basis of the opinion of the court below. However, we would add our thoughts with respect to the challenge to the sentence on the grounds that it is excessive. *Commonwealth v. Tuladziecki*, 513 Pa. 508, 522 A.2d 17 (1987) permits an appeal from the discretionary aspect of a sentence only where the appellant includes in his brief, immediately preceding argument in support of the challenge, a separate concise statement of the reasons for allowance of appeal under 42 Pa.C.S. § 2119(f), and appellant has not complied with this requirement. Nevertheless, we concluded in *Commonwealth v. Krum*, 367 Pa. Super. 511, 533 A.2d 134 (1987) that the requirement of Pa.R.A.P. 2119(f) is procedural only and is waived if not raised by the Commonwealth. *See also, Commonwealth v. Losch*, 369 Pa. Super. 192, 535 A.2d 115 (1987); *Commonwealth v. Smith*, 375 Pa. Super. 419, 544 A.2d 991 (1988). However, the commonwealth has objected to the appellant's failure to comply with Rule 2119(f), and its objection is appropriate. Accordingly, we must quash the appeal as it pertains to the excessiveness of sentence.[4]

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any other matter appearing thereon. This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.

While we granted the appellant permission to file a brief not to exceed 130 pages, serious effort must be made to comply with the Rules of Appellate Procedure concerning the contents of briefs.

[4] Even if the Commonwealth had not objected to the appellant's failure to comply with 42 Pa.C.S. § 2119(f), under 42 Pa.C.S. § 9781(c) an allowance of appeal may be granted at the discretion of the appellate court only where it appears that there

Appeal quashed as to excessiveness of sentence and judgment of sentence affirmed.

Opinion by Novak, J. of Allegheny County Court of Common Pleas attached. (January 19, 1988)

Del Sole, J. files Concurring Memorandum.

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	NO. 00485 Pittsburgh, 1988
WILLIAM FIORE, Appellant	:	

Appeal From Judgment of Sentence April 10, 1987 In Court of Common Pleas, Criminal Division, Allegheny County, at No. CC8508740

BEFORE: CAVANAUGH, DEL SOLE and MONTGOMERY, JJ.

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is a substantial question that the sentence imposed is not appropriate. In exercising that discretion the court may consider the trial court's opinion and the record. *Commonwealth v. Darden*, 366 Pa. Super. 597, 531 A.2d 1144 (1997); *Commonwealth v. Felix*, 372 Pa. Super. 145, 539 A.2d 371 (1988). Considering the gravity and great number of offenses committed, and the potential impact on the environment, we would find no substantial question as to the appropriateness of the sentence, even if we were to reach that issue.

CONCURRING MEMORANDUM BY DEL SOLE, J.:

I concur in the result reached by the Majority but would affirm the Judgment of Sentence. I disagree with the Majority's decision to disallow an appeal from the discretionary aspects of sentencing.

At the outset I believe the time has come for the General Assembly to review 42 Pa. C.S.A. § 9781(b) which limits the review of discretionary sentencing matters to those cases where only a "substantial question" exists and where this court agrees to exercise its discretion and hear the issue. It is my view that in a criminal proceeding a defendant has a right to have all matters reviewed which have been properly preserved at the trial court level. Further, I believe that Article 5, Section 9 of the Constitution of this Commonwealth prohibits the limitation of review found in 42 Pa. C.S.A. § 9781(b). That Article provides as follows:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

In my view this section establishes a right of appeal from a court of record to an appellate court. The applicable section of the sentencing code that eliminates a *right* of appeal by requiring that review of certain sentencing questions is purely discretionary with the appellate court would seem to violate this constitutional provision. This

question can only be addressed in the appellate courts and is not an issue that can be raised in the trial court.

With regard to to [sic] the case sub judice, having reviewed the sentence and the reasons for the sentence stated by the sentencing judge, I do not believe that the trial judge abused his discretion in imposing the sentence. I believe that the sentence imposed by the trial judge was appropriate and proper under the circumstances and would, therefore, affirm the judgment of sentence.

Dave SCARPONE, Appellant,

v.

COMMONWEALTH of Pennsylvania, Appellee.

Commonwealth Court of Pennsylvania.

Argued Oct. 4, 1990.

Decided Aug. 5, 1991.
Petition for Allowance of Appeal
Granted Nov. 7, 1991.

Robert J. Amelio, for appellant.

George Jugovic, Jr., Sp. Deputy Atty. Gen., for appellee.

Before McGINLEY and KELLEY, JJ., and BARRY, Senior Judge.

KELLEY, Judge.

David Scarpone, appellant, was employed as general manager of the Municipal and Industrial Disposal Company (MIDC). MIDC is owned by William Fiore and consists of a fly-ash disposal facility and a demolition waste disposal site in Elizabeth Township, Allegheny County. In 1979, Fiore decided to construct a lined pit for the placement of industrially generated wastes on the same site adjacent to the fly-ash disposal facility. The Department of Environmental Resources (DER) granted a permit to construct the pit. The permit required individual deposits of waste into the pit (waste streams) to be approved by DER. The pit contained an underground monitoring pipe that provided DER inspectors the ability to monitor the outfall of the pipe to determine if hazardous waste was leaking, causing pollution of the environment.

In 1982 and 1983, inspectors began to detect hazardous waste from the monitoring pipe and DER informed Fiore that no deposit approvals (Module 1 approvals) would be issued until the condition was resolved. In July of 1983, Scarpone directed other employees to surreptitiously alter the monitoring system by excavating the area around the outfall of the monitoring pipe and altering its flow. The intake of the original monitoring pipe was capped and a smaller pipe was installed to bring a trickle of uncontaminated water into the monitoring pipe.

DER inspectors discovered this alteration and criminal charges were filed against Scarpone and Fiore in the Court of Common Pleas of Allegheny County. Upon a jury trial, Scarpone was convicted of causing and assisting in the operation of a hazardous waste disposal facility without a permit in violation of the Solid Waste Management Act (SWMA),[1] obstructing the administration of law or other governmental function,[2] and conspiracy.[3] This appeal followed.[4]

Scarpone's first argument is that it was error for him to be charged in Count 1 of the criminal information with

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[1] Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-6018.1003.

[2] 18 Pa.C.S. § 5101.

[3] 18 Pa.C.S. § 903.

[4] Scarpone originally appealed to the Superior Court. The appeal was transferred sua sponte to this Court which has jurisdiction of the SWMA conviction pursuant to 42 Pa.C.S. § 762(a)(2)(ii). We may exercise jurisdiction over the related convictions under *Commonwealth v. Tyson*, 57 Pa.Commonwealth Ct. 569, 427 A.2d 283 (1981).

operating a waste disposal facility without a permit when Fiore possessed a permit for the facility. Scarpone argues that the only way he could be convicted of this offense is if the permit had been revoked. Count 1 reads as follows:

> The defendant Dave Scarpone did cause and assist in violations of the Solid Waste Management Act, to wit, the defendant caused and assisted in the alteration of monitoring pipes at a hazardous waste disposal facility in Elizabeth Township, Allegheny County operated without a permit from the Pennsylvania Department of Environmental Resources ('DER') for such alterations from 1983 until 1985, in violation of 35 P.S. § 6018.401(a), which assistance violates 35 P.S. § 6018.610(9) and is a felony of the second degree pursuant to 35 P.S. § 6018.606(f).

The Commonwealth argues that the modifications of the monitoring pipe created a facility not authorized by the permit. In other words, the Commonwealth's argument is that Fiore was acting beyond the scope of the permit and this justifies the charge of operating without a permit.

In wording Count 1, the Commonwealth relied on §§ 401(a), 606(f), and 610(9) of the SWMA. These sections read, respectively:

> No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment

> and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department.

35 P.S. § 6018.401(a).

> Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both.

35 P.S. § 6018.606(f).

> It shall be unlawful for any person or municipality to:
>
> . . . .
>
> (9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

35 P.S. § 6018.610. If the alteration of the monitoring pipe can be said to result in the operation of a hazardous waste facility without a permit under § 401(a), then Scarpone may be charged as an accomplice under § 610(9) to a second degree felony under § 606(f).

The Commonwealth cites two cases from this Court in support of its interpretation of these sections. In *Department of Environmental Resources v. Fleetwood Borough Authority*, 21 Pa.Commonwealth Ct. 349, 346 A.2d 867 (1975), this Court upheld a criminal conviction for violating The Clean Streams Law (Law)[5] where the borough authority had a sewer permit but discharged improperly treated water. Section 202 of the Law[6] declares that no person or municipality shall discharge sewage into the waters of the Commonwealth without first obtaining a permit. We concluded that the authority had no permit to discharge sewage which had not been satisfactorily treated.

In *Trevorton Anthracite Company v. Department of Environmental Resources*, 42 Pa.Commonwealth Ct. 84, 400 A.2d 240 (1979), this Court upheld civil penalties for the alteration of a waste treatment facility. Trevorton Anthracite Company had a permit to construct a large settling lagoon for the purpose of allowing suspended solids to settle out of the water before the water was discharged into a stream. In accordance with the permit, three weir boxes, with openings two inches below the surface of the water, were placed along the berm of the lagoon to allow the water to discharge. When two of the boxes became clogged, Trevorton replaced them with an overflow pipe which had an intake point a foot below the surface of the water. This Court upheld a conclusion that

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[5] Act of June 22, 1937, P.L.1987, as amended, 35 P.S. §§ 691.1-691.1001.

[6] 35 P.S. § 691.202.

the company had violated § 308 of the Law[7] which makes it unlawful to construct or erect treatment works without a permit.

Both *Fleetwood Borough* and *Trevorton Anthracite* were decided under The Clean Streams Law and not the SWMA. In *Fleetwood Borough*, the criminal sanction was authorized by § 602 of the Law[8] which, at the time the case was decided, did not specifically provide a criminal penalty for violating the conditions of a permit. Section 602 did not set out criminal sanctions for specific violations of the Law, but merely provided penalties for any person who "violates any provision of this act or any rule or regulation or order of the board or any order of the department. . . . " *Fleetwood Borough*, 21 Pa.Commonwealth Ct. at 352, 346 A.2d at 869. Similarly, in *Trevorton Anthracite* the civil penalties were authorized by § 605 of the Law[9] which, again, did not address specific violations but merely referred to a violation of the Law, a rule or regulation of the department, or an order of the department.

In contrast to the general nature of the penalty provisions in The Clean Streams Law when the General Assembly enacted the Solid Waste Management Act, it saw fit to give a more structured format to the penalty provisions. In § 606 of the SWMA, in addition to general criminal sanctions similar to those in The Clean Streams Law, § 606(d) establishes a third degree misdemeanor for

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[7] 35 P.S. § 691.308.

[8] 35 P.S. § 691.602.

[9] 35 P.S. § 691.605.

the transportation of any hazardous waste to a facility which does not possess a permit to accept such waste; for the falsification of documents prepared for purposes of compliance with the act; and for the municipal storage of hazardous waste without a permit. Section 606(f) under which Scarpone was convicted establishes a second degree felony for violations of § 401 or any DER order. Section 401 requires that any person operating a hazardous waste facility obtain a permit.

Section 606(g) of the SWMA establishes a first degree felony for "[a]ny person who intentionally, knowingly or recklessly stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of any provision of this act, and whose acts or omissions cause pollution, a public nuisance or bodily injury to any person. . . ." Section 601[10] provides that a violation of "any term or condition of any permit, shall constitute a public nuisance." Thus the SWMA has a specific provision providing a penalty for a violation of the conditions of a permit, something which the relevant statutory sections in *Fleetwood Borough* and *Trevorton Anthracite* lacked.[11]

There is no question that Scarpone's activities were reprehensible and deserving of punishment. The Commonwealth is constrained, however, to follow the legislature's dictates in pursuing criminal charges for this sort of conduct. We cannot help but conclude that the Commonwealth's interpretation of § 606(f) is strained at best.

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[10] 35 P.S. § 6018.601.

[11] Sections 602 and 605 of The Clean Streams Law were later amended to add language concerning the violation of the conditions of a permit.

DER issued a valid permit for the waste disposal facility. The alteration of the monitoring pipe was clearly a violation of the conditions of the permit. But to say that the alteration resulted in the operation of a new facility which had not been permitted is to engage in a semantic exercise which we cannot accept. As a penal provision of a statute, § 606(f) must be strictly construed, 1 Pa.C.S. § 1928(b)(1), and we will not let its language be stretched to include activities which clearly fall in some other subsection. That is the case here where § 606(g) plainly establishes a first degree felony for violating the conditions of a permit. Accordingly, we must reverse the conviction of causing and assisting in the operation of a hazardous waste facility without a permit.[12]

Scarpone was also charged with obstructing a governmment function under 18 Pa.C.S. § 5101, which reads:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

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[12] Because of our disposition of this issue, we need not address Scarpone's arguments that Count 1 failed to provide notice of the issues for trial and the charges to be defended, and that the Commonwealth was required to prove the culpable commission of the crime in order to obtain a felony conviction.

Scarpone argues that he could not be convicted of this crime because there was no "affirmative interference with governmental functions". He seems to be arguing that there must be some sort of physical interference with the DER inspectors as they perform their duties in order for a violation under this section to occur. Scarpone cites no cases which support this theory, and we are satisfied that capping a monitoring pipe and diverting uncontaminated water into the pipe is affirmative interference with a governmental function and "physical interference or obstacle" which obstructs the administration of law. His conviction on this charge will therefore be affirmed.

Scarpone was charged in Count 6 (originally Count 9) with criminal conspiracy. Count 6 reads as follows:

> The defendant Dave Scarpone did, with the intent of promoting and facilitating its commission, agree with William Fiore and other persons known and unknown to engage in conduct prohibited by the Solid Waste Management Act of 1980 and the Crimes Code and did perform or cause to be performed overt acts in pursuit of this conspiracy, to wit, the defendant, with the intent to promote and facilitate illegal discharges and disposal of industrial, residual and hazardous wastes, agree with William Fiore and other persons known and unknown to engage personally and through the conduct of employees acting under his control and supervision in such activity and did perform numerous overt acts, including but not limited to the illegal disposal of residual and hazardous wastes and the alteration of piping systems under a hazardous waste facility in Elizabeth Township, Allegheny County, in violation of 18 Pa.C.S. § 903.

Scarpone argues that the count is invalid because it does not mention the specific section of the SWMA or a specific crime which was the subject of the conspiracy. He makes a similar argument with respect to the trial judge's charge to the jury.

Because of our reversal of the conviction under Count 1, we must also reverse the conspiracy conviction. Scarpone could not be convicted of conspiracy to violate § 606(f) because the conduct which was allegedly the object of the conspiracy was not a crime under § 606(f). The Commonwealth neither charged nor attempted to prove conspiracy to commit a violation of § 606(g).

The trial judge explained in his opinion that instead of imposing consecutive sentences for each count, he chose to impose a single sentence for the Count 1 conviction, and no further sentence for the convictions on Counts 3 and 6. Under such circumstances, where the sentence for one count may have been influenced by the sentence imposed for a second count which is subsequently reversed, a remand is appropriate for resentencing. *Commonwealth v. Santiago*, 489 Pa. 527, 414 A.2d 1016 (1980) (where trial court imposed single consolidated sentence for three counts and one of the convictions was reversed, case was remanded for resentencing on remaining counts); *Commonwealth v. Padden*, 335 Pa.Superior Ct. 51, 483 A.2d 950 (1984) (remand for resentencing where the court could not say whether the trial court would have imposed the same sentences for two aggravated assault convictions if it had known that a third conviction

would be invalidated); *Commonwealth v. Grassmyer*, 237 Pa.Superior Ct. 394, 352 A.2d 178 (1975) (where trial court merged indecent assault conviction into statutory rape conviction when sentencing defendant and statutory rape conviction was reversed, case was remanded for resentencing on indecent assault conviction); *Commonwealth v. Lockhart*, 223 Pa.Superior Ct. 60, 296 A.2d 883 (1972) (invalidation of conviction on one count which may have influenced the sentence on remaining counts resulted in remand for resentencing).

In summary, we reverse the trial court's judgment of sentence as to the convictions of operating a hazardous waste facility without a permit (Count 1) and conspiracy (Count 6), and affirm as to the conviction of obstructing the administration of law or other governmental function (Count 3). We remand for resentencing.

ORDER

NOW, this 5th day of August, 1991, the order of the Court of Common Pleas of Allegheny County, CC No. 8508741, dated April 10, 1987, is reversed with respect to the convictions of operating a hazardous waste facility without a permit (Count 1) and conspiracy (Count 6), and affirmed with respect to the conviction of obstructing the administration of law or other governmental function (Count 3). We remand for resentencing.

Jurisdiction relinquished.

COMMONWEALTH of Pennsylvania, Appellant at No. 104 W.D. Appeal Docket 1991.

v.

Dave SCARPONE, Appellant at No. 103 W.D. Appeal Docket 1991.

Supreme Court of Pennsylvania.
Argued Sept. 24, 1992.
Decided Dec. 15, 1993.

Robert J. Amelio, Pittsburgh, for Dave Scarpone.

Ernest D. Preate, Jr., Atty. Gen., Anthony Sarcione, Executive Deputy Atty. Gen., Robert A. Graci, Chief Deputy Atty. Gen., Andrea F. McKenna, Deputy Atty. Gen., Harrisburg, for Com.

Before NIX, C.J., FLAHERTY, ZAPPALA, PAPADAKOS and CAPPY, JJ.

OPINION OF THE COURT

PAPADAKOS, Justice.

Two issues are presented for our consideration in this appeal by Dave Scarpone and the Commonwealth. These issues involve the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101 et seq., specifically §§ 6018.606(f) and 6018.401, and the Crimes Code, Act of Dec. 6, 1972, P.L. 1482, No. 334, eff. June 6, 1973, as amended, 18 Pa.C.S. § 101 et seq., specifically § 5101.

Scarpone appeals from the affirmance of his conviction of obstructing the administration of law and other

governmental function (18 Pa.C.S. § 5101) and the Commonwealth cross-appeals from the reversal of Scarpone's conviction of causing and assisting in the operation of a hazardous waste disposal facility without a permit (35 P.S. §§ 6018.606(f) and 6018.401) 141 Pa.Commonwealth 560, 596 A.2d 892.

Dave Scarpone was the general manager of the Municipal and Industrial Disposal Company (MIDC) which is located in Elizabeth Township, Allegheny County. It operated a fly-ash disposal facility and a demolition waste disposal site. In 1979, the facility received a permit to dispose of various wastes including hazardous wastes. MIDC is owned by Scarpone's co-defendant at trial, William Fiore.

For each type of waste or "waste stream" which the company intended to receive at this site, it was required to submit a form or "module" to the Department of Environmental Resources (DER) for approval. The form known as "Module 1" indicates the type of waste, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed. The information is certified by an engineer employed by the landfill operator. DER then reviews the proposal to determine whether the particular waste stream is compatible with: 1) other waste deposited on that site, and 2) the site liner. Upon receipt of a module, DER's technical staff reviews it. DER will then either approve or reject the module. If rejected, the landfill operator may not deposit this particular waste at his facility.

MIDC's disposal facility contained, inter alia, a Phase I disposal pit, a temporary disposal pit, and a demolition

site. The facility was licensed to receive certain streams of hazardous waste and deposit them in the temporary pit and later the Phase I pit. The Phase I pit was lined with natural clay which had been found to be sufficient to contain the wastes and keep them from seeping out. After the Phase I pit was full, it was eventually to be closed and covered in order to return the site to its natural condition. In order to be sure that the hazardous wastes were not seeping into the environment, various monitoring systems were established.

Running under the Phase I pit was an under-drain which was identified as pipe 810. This under-drain converges with the 711 pipe in a manhole near the pit and emits a single discharge. The purpose of the under-drain was to convey mine water beneath the disposal pit carrying it away from the liner. If the liner failed, materials seeping out of the pit through the liner would appear in the under-drain.

In late 1982 and early to mid 1983, a DER Solid Waste Supervisor, Mr. Dan Peterson, during routine inspection visits, detected a strong organic odor coming from the manhole. He described this odor as very similar to the type of odor that one gets when one is around a disposal pit. Also, it was considered similar to odors one gets at a U.S. Steel coke-making facility. Numerous samples of the discharge from the 711 and 810 pipes were collected by the DER and tested at their laboratory in Harrisburg. The samples tested positive for the presence of organic chemicals (i.e., Benzene, Toluene and Xylene).

DER officials informed Mr. Fiore that no additional requests to dispose of hazardous wastes would be

approved until the matter was resolved. Subsequently, several meetings were held between MIDC and DER officials. As a result of these discussions, MIDC and the Commonwealth entered into a "Consent Order and Agreement." The agreement provided that MIDC would apply for a water quality permit (NPDES) which would set certain limits on the chemicals discharged from the site. If the discharge exceeded those limits, MIDC agreed either to establish a treatment plant on the site or collect the discharge and transport it to a treatment plant.

Subsequently, in November of 1983, James R. Shack, a solid waste specialist for the DER, who took samples from both the 810 pipe and the 711 pipe, noticed that the discharge flow from the 810 pipe had lessened significantly and the odors no longer existed. On July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. Since he was curious about this phenomenon, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates.

Charles Kroll, a welder, testified that he was contacted and hired by Mr. Scarpone during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to a disposal pit which was not yet in use. Mr. Kroll also indicated that Mr. Scarpone directed this capping activity. Another welder, Elmer Holmes, testified that during the same time period, he was hired and directed by Mr. Scarpone to install a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the

ground. Inside this stand pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type wrench, could be turned on and off.

The capping of the 810 pipe prevented the flow of water from under the Phase I pit into the 810-711 monitoring point. This was the discharge which previously had given off organic odors leading to the finding that hazardous wastes were seeping into the aquifer running under the pit. The newly installed connecting pipe brought water from the unopened disposal pit to a point in front of the cap. Had this alteration not been made, the capping of the 810 pipe would have prevented any flow at all at the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and on into an unnamed tributary of the Youghiogheny River. Employees of MIDC testified that they observed Mr. Scarpone, and others, open this valve at night and on weekends when DER officials were not likely to appear to check the monitoring point.

Although Mr. Scarpone and Mr. Fiore were not charged with polluting the waterways, the Commonwealth's evidence established that when the valve was turned on, a discharge flowed from the outfall pipe into the tributary. Samples of this discharge were collected in small stainless steel buckets. These samples were transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists. The samples all contained hazardous wastes. Two former MIDC employees testified that on various occasions they were present

when Mr. Scarpone personally opened the valve or ordered other persons to open the valve.

When DER discovered the alterations, it filed criminal charges against both Fiore and Scarpone in the Court of Common Pleas of Allegheny County. After a jury trial, Mr. Scarpone was found guilty of violating the SWMA by causing and assisting in the operation of a hazardous waste disposal facility without a permit (35 P.S. §§ 6018.606(f) and 6018.401); obstructing the administration of law and other governmental function (18 Pa.C.S. § 5101); and criminal conspiracy (18 Pa.C.S. § 903). Post-trial motions were timely filed and denied.

Mr. Scarpone was sentenced to pay a fine of $5,000.00 and to serve a period of incarceration of not less than 11 1/2 months nor more than 23 months. A motion to reconsider was denied and appeal to the Commonwealth Court followed. The Commonwealth Court reversed Scarpone's conviction of causing and assisting in the operation of a hazardous waste facility without a permit, and affirmed the obstruction (6018.606(f) and 6018.401) and conspiracy (18 Pa.C.S. § 903) convictions. The Commonwealth challenges the reversal of the permit conviction and Scarpone challenges the affirmance only of the obstruction charge. We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were both charged with and found guilty of operating without a permit.

Scarpone took his appeal to the Commonwealth Court and that court found it impossible to conclude that the alteration of the pipe resulted in the operation of a

new facility for which no permit had been issued. Although the facility may have acted in breach of the permit it held, the court would not hold that this was tantamount to acting without any permit.

Fiore took his appeal to the Superior Court and raised the issue by way of a sufficiency of the evidence argument. The Superior Court found the evidence sufficient and issued an unpublished memorandum opinion upholding his conviction of operating a hazardous waste facility without a permit. The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations.

We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit. A more appropriate charge may have been brought under alternative provisions of the statute, viz, 35 P.S. §§ 6018.606(g) and 6018.601.

Section 35 P.S. § 6018.606(g) of the SWMA makes it a first degree felony for "[a]ny person who intentionally, knowingly or recklessly stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of any provision of this act, and whose acts or omissions cause pollution, a public nuisance or bodily injury to any person . . . ". 35 P.S. § 6018.601(a) provides that a violation of "any term or condition of any permit, shall constitute a public nuisance." Hence, the SWMA has specific provisions providing a penalty for violations of the conditions of a permit. Under such circumstances, the Commonwealth must adhere to the legislative scheme in

pursuing criminal charges. The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 Pa.C.S. § 1928(b)(1).

We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one.

Mr. Scarpone was also charged with and convicted of obstructing a government function under 18 Pa.C.S. § 5101.

That statute reads:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

Mr. Scarpone argued to the Commonwealth Court that he could not be convicted of this crime because there

was no "affirmative interference with governmental functions." He appeared to argue that there must be some sort of actual physical interference with the DER inspectors as they perform their duties in order for a violation under this section to occur. In his direct appeal to us, Mr. Scarpone has cited no persuasive authority which supports this theory and, like the Commonwealth Court, we are satisfied that what took place here was affirmative interference with a governmental function. Mr. Scarpone's conviction on this charge must be affirmed.

For the reasons set forth above, the Commonwealth Court's setting aside of Mr. Scarpone's conviction of operating a hazardous waste facility without a permit is affirmed. Mr. Scarpone's conviction of obstructing the administration of law or other governmental function is affirmed.

LARSEN, J., did not participate in the consideration or decision of this case.

ZAPPALA, J., concurs in the result.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM FIORE

CRIMINAL DIVISION

CC No. 8508740

MOTION FOR POST-CONVICTION COLLATERAL RELIEF

Filed on behalf of:
DEFENDANT

Counsel of record for this party:

HAROLD GONDELMAN, ESQ.
Pa. Id. #00614

38th Floor
One Oxford Centre
Pittsburgh, PA 15219

(412) 263-1833

MOTION FOR POST-CONVICTION COLLATERAL RELIEF

AND NOW comes the defendant, William Fiore, by his attorney, Harold Gondelman, and moves your Honorable Court for post-conviction collateral relief and in support thereof sets forth as follows:

1. The defendant is William Fiore.

2. He is currently imprisoned in the Western Correctional Diagnostic and Classification Center of Pennsylvania and has been so confined since February 23, 1988 plus approximately two months served prior thereto.

3. The defendant was sentenced upon his conviction of operating a hazardous waste facility without a permit for a total of five to ten years upon counts I and II and fines totalling $200,000.00, as will more particularly appear by a copy of the Order in question attached to the exhibits filed in support of this motion as Exhibit 1.

4. The defendant was sentenced on April 10, 1987.

5. The defendant was convicted by a jury on Counts I and V and by the Court without a jury on Count II.

6. The sentences were imposed on said date and the defendant is now serving those sentences.

7. The judge who presided at the trial and imposed sentence is the Honorable Raymond A. Novak.

8. Post-conviction motions were denied by the Honorable Raymond A. Novak and an appeal was taken to the Superior Court to No. 485 Pittsburgh Term, 1988, which Court affirmed the conviction. A copy of the Memorandum Opinion of the Superior Court dated May 12, 1989 is attached to the exhibits submitted with this motion as Exhibit "2".

9. A petition for allocatur was filed with the Supreme Court of Pennsylvania to No. 507 W.D. Allocatur Docket, 1989, which petition was denied on

August 1, 1991, as shown by the exhibit attached as Exhibit "3".

10. The co-defendant Dave Scarpone appealed to the Commonwealth Court and on August 5, 1991 said Court, at No. 75 T.D. 1987, reversed his judgment of sentence insofar as operating without a permit is concerned. The Commonwealth appealed that decision and the Supreme Court, on December 15, 1993, affirmed the Commonwealth Court. For the convenience of the Court, the decision of the Supreme Court is submitted with the exhibits as Exhibit "4".

11. An application for extraordinary relief and appendix was filed on behalf of William Fiore at No. 9 W.D. Misc. Docket 1992, which requested that the Fiore matter decided by the Superior Court be taken by the Supreme Court and consolidated with the Scarpone appeal. That application was denied on March 25, 1992.

12. On January 27, 1993, an emergency application for extraordinary relief and appendix were filed with the Supreme Court to No. 7 W.D. Misc. Docket 1994 attempting to have the Supreme Court eliminate the anomalous result existing, namely that Scarpone has not committed a crime of operating a facility without a permit because the statute does not apply but Fiore is imprisoned on the identical fact situation.

13. On March 22, 1994, the Supreme Court denied the emergency application for extraordinary relief.

14. There are no further matters pending relating to the sentences for which Fiore is presently incarcerated. The attorneys who represented Fiore are Robert Ging,

Esquire and Martin W. Sheerer, Esquire and Harold Gondelman, Esquire in seeking review by the Supreme Court as above referenced.

15. The relief requested is the vacating of the sentences at Counts I and II by reason of the Supreme Court having held that the facts charged in the indictment do not constitute a crime.

16. In the Commonwealth's answer to Fiore's petition to the Supreme Court for extraordinary relief, it was alleged that Fiore did not preserve the grounds for appeal as Carpone's [sic] counsel did. Attorney Sheerer in his brief to the Superior Court specifically raised the issue that

> "As a site permittee, appellant [Fiore] could not be guilty of operating a hazardous waste disposal without a permit for such disposal facility because he already had one." See Exhibit 5, pages 13 and 14 submitted as an exhibit in support of this motion."

17. As set forth on page 8 of the Opinion of the Supreme Court, it was held:

> "We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were both charged with and found guilty of operating without a permit."

18. On page 9 of the Opinion the Supreme Court held:

> "The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised

on how it should proceed in such situations. We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit."

19. At the trial of Mr. Fiore, the jury submitted the following question to the Court:

> "By law does a permit violation automatically 'revoke' – that is the jury's word – or suspend that permit, or must it be worded so in the permit?"

20. A copy of the transcript of those proceedings is attached to the exhibits submitted with this motion as Exhibit 6.

21. As stated in the Opinion of the Supreme Court, the Fiore and Scarpone appeals first went to the Superior Court which *sua sponte* sent them to the Commonwealth Court. On Fiore's prior counsel's motion the Commonwealth Court sent his case back to the Superior Court but retained the Scarpone case. Thus, the two courts had the same fact situation before them and reached diametrically opposite results.

22. If the Commonwealth persists in its position that Fiore did not preserve the issue that he could not be guilty of operating without a permit when he in fact had a permit, then this motion must be treated as raising the issue of ineffective assistance of prior counsel so the matter would be before this Court on its merits.

23. In light of the Supreme Court decision which was designed to give the Attorney General of the Commonwealth of Pennsylvania guidance in prosecuting violations relating to permits, the admonition of Justice Sutherland in *Berger v. United States*, 294 U.S. 78, 55 S.Ct. 619 (1935), is apposite:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all: and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that the guilty shall not escape or innocence suffer . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

24. In this case it is obvious that one defendant whose case was decided by the Commonwealth Court has been found not to have committed a crime under the identical facts produced against Fiore which resulted in his conviction being sustained by the Superior Court.

25. Although Fiore, through counsel, did everything to try to avoid the incongruous result that presently exists by filing motions with the Supreme Court he nevertheless is placed in the position of having to proceed before the trial court since the matter has not been decided by any appellate court on the merits.

26. What Fiore is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts.

27. The sentence of the Court should be vacated by reason of the adjudication by the Supreme Court of Pennsylvania. Vacating the sentences on those counts which the Supreme Court has found not violative of the statute would make Fiore eligible for immediate release from incarceration.

WHEREFORE, William Fiore prays your Honorable Court for a hearing on this motion and, after hearing, for the vacating of the orders of sentence imposed on April 10, 1987 and further prays your Honorable Court for bond pending disposition of this motion.

ARGUMENT IN SUPPORT OF MOTION

The motion filed on behalf of William Fiore is both under the Pennsylvania Rules of Criminal Procedure Rule 1501 *et seq.* and the Post-Conviction Relief Act, 42 Pa.C.S.A. § 9541 *et seq.* Under the Act, § 9543(a)(2)(i) provides for relief if the conviction or sentence resulted from "a violation of the . . . laws of this Commonwealth . . . which in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." The facts in this case are peculiar, to say the least. Scarpone's conviction has been set aside by the Supreme Court of Pennsylvania for the reason that he was acting under a permit issued to Fiore and Fiore's business entities. The Supreme Court held that his actions, therefore, could not be a violation of operating without a permit

since Fiore in fact had a permit. Fiore, on the other hand, is incarcerated because although he had a permit the courts have not found that the same evidence that convicted Scarpone exonerates Fiore.

In the Federal Court system after the Supreme Court of the United States in *McNally v. United States*, 107 S.Ct. 2875 (1987), repudiated the intangible rights theory of mail fraud cases, defendants who had been convicted and whose convictions were final were able to move under 28 U.S.C. § 2255 to vacate their sentences. Attached to the exhibits submitted with the motion is an opinion of Judge Plunkett, of the District Court for the Northern District of Illinois, Eastern Division, in *United States v. Lovett*. The Court held that the instructions in the *Lovett* case allowed the jury "to convict for conduct that is outside the scope of the mail fraud statute" as later determined by the Supreme Court of the United States in *McNally*. He held, therefore, that the conviction had to be vacated (see page 11). The discussion in the *Lovett* case is interesting because it deals with the retroactivity of the *McNally* decision.

Fiore's motion is more persuasive since it isn't a question of retroactivity. The Supreme Court has found specifically that the facts introduced against Fiore, being the same facts introduced against Scarpone, "did not make out the crime of operating a waste disposal facility without a permit. Simply put, Mr. Scarpone did have a permit." As stated, that permit was Fiore's permit. The Supreme Court further held in facts applicable to this very case "But to conclude that the alteration constituted the operation of a new facility *without a permit* is a bald

fiction we cannot endorse. Penal provisions of the statute must be strictly construed under 1 P.S. § 1928(b)(1)."

The American Bar Association's Project on Criminal Justice, referring to the prosecution function, states, under 3-1.1 (c):

> The duty of the prosecutor is to seek justice, not merely to convict.

At 3-1.4 the ABA states:

> "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action."

Under Rules of Professional Conduct, Rule 3.8, the prosecutor in a criminal case is told to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

The Supreme Court decision in Scarpone is equally applicable to Fiore. At page 8 of the slip opinion the Supreme Court stated:

> "We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were *both* charged with and found guilty of operating without a permit."

On page 9 of the slip opinion, the Supreme Court held:

> "The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations. We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute."

The Attorney General would be ill-advised to institute an action against the operator of a hazardous waste facility under the facts presented against Mr. Fiore now that the Supreme Court has spoken. It is respectfully submitted to the Attorney General, as well as to this Court, that being sworn to uphold the laws of the Commonwealth of Pennsylvania, the Attorney General's office should join in this motion to vacate the felony convications [sic] against Fiore when the Supreme Court has held that no crime has been committed. The conviction and sentences against Fiore relating to the operation of a facility without a permit should be vacated and he should be discharged from custody.

Respectfully submitted,

_____

Harold Gondelman

Attorney for Defendant

VERIFICATION

I, WILLIAM FIORE, defendant within named, have read the foregoing Motion for Post-Conviction Collateral Relief and state that the averments of fact made in said Motion for Post-Conviction Collateral Relief are true and correct, to the best of my knowledge, information and belief.

I understand that false statements herein are made subject to penalty of 18 Pa.C.S., Section 4904, relating to unsworn falsification to authorities.

/s/ William Fiore
William Fiore

DATED: March 28, 1994

CERTIFICATE OF SERVICE

Service of a true and correct copy of the foregoing Motion was made on the following named persons the _____ day of _____, 1994, by forwarding the same to him, at his office addresses, via U.S. mail, postage prepaid, addressed as follows:

Ernest D. Preate, Jr., Esquire
Attorney General
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	NUMBER: CC8508740
VS.	RESPONSE TO DEFENDANT'S MOTION FOR POST CONVICTION RELIEF
WILLIAM FIORE	FILED ON BEHALF OF THE COMMONWEALTH OF PENNSYLVANIA

COUNSEL OF RECORD FOR THE COMMONWEALTH OF PENNSYLVANIA

ERNEST D. PREATE, JR.
ATTORNEY GENERAL
COMMONWEALTH OF
PENNSYLVANIA

FRANK J. GRZYWINSKI
DEPUTY ATTORNEY GENERAL
PA. ID# 42094

OFFICE OF
ATTORNEY GENERAL
ENVIRONMENTAL CRIMES
SECTION
400 WATERFRONT DRIVE
PITTSBURGH, PA 15222
(412) 442-4283

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

AND NOW, comes the Commonwealth of Pennsylvania through its attorney, Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, Mark

Bellavia, Chief Deputy Attorney General and Frank J. Grzywinski, Deputy Attorney General who in response to defendant's Motion for Post Conviction Relief answers as follows:

1. Admitted.

2. Admitted.

3. Admitted. In way of further answer the Commonwealth would note that in addition to serving a sentence of incarceration at No. CC8508740 that the defendant was also convicted and serving a period of incarceration at CC8509328.

4. Admitted that defendant was sentenced on April 10, 1987 at CC8508740. However, the defendant was sentenced at 8509328 on April 14, 1987.

5. Admitted.

6. Admitted, as previously set forth in paragraphs 3. and 4.

7. Admitted.

8. Admitted.

9. Admitted.

10. It is admitted that Scarpone appealed to Commonwealth Court, however Scarpone also appealed the Commonwealth Court decision to the Supreme Court.

11. Admitted in part that defendant requested extraordinary relief. However, it is denied that defendant Fiore is eligible for extraordinary relief.

12. It is admitted that a petition was filed, but denied that defendant is entitled to any relief.

13. Admitted that the Supreme Court denied relief. However, it is denied that defendant Fiore is eligible for post conviction relief.

14. Denied. In way of further answer, the Commonwealth asserts the defendant is currently awaiting sentencing on related charges in the Court of Common Pleas of Westmoreland County. In addition, the Commonwealth would note that the defendant had been represented by Robert Ging, Esquire at CC8508740; John Doherty, Esquire at CC8509328; Timothy Sheerer, Esquire at 8509328; Martin W. Sheerer on appeal at 8508740 and 85009329; and Allen Bruenwasser, Esquire on a Petition for Writ of Habeas Corpus filed at CC8508740, and CC8509328.

15. Denied. The Commonwealth asserts the defendant is not entitled to any relief from the sentences imposed at Counts 1 and 2 since the Supreme Court has denied defendant's request for emergency extraordinary relief. Moreover, the decision of *Scarpone* may not be retroactively applied to the petitioner since his case was not on direct appeal and the issue has not been properly preserved. *Commonwealth vs. Ahearn*, 516 A.2d. 45 (Pa. Super. 1986). See *Commonwealth vs. Khorey*, 555 A.2d. 100 (Pa. 1989) defendant who had withdrawn guilty plea was not entitled to withdraw plea when co-defendant, who pressed on with challenge to Attorney General jurisdiction was successful in having charges dismissed.

16. Denied. While it is admitted that the Commonwealth responded that defendant Fiore did not preserve the issue for appeal, it is denied that Attorney Sheerer raised the issue as set forth as set forth [sic] by petitioner.

In way of further answer, the Commonwealth would note that in the concise statement of matters complained of on appeal filed by Martin W. Sheerer, Esquire on May 21, 1987 the petitioner raises a sufficiency of evidence argument, while defendant, Scarpone argued at No. 75 TD 1987 that "the legislature provided a specific, exclusive, constitutionally adequate method for determination as to whether a permit should be issued, denied, modified, suspended, or revoked." Thus Scarpone argued that he could have only been charged with operating without a permit if the permit had first been revoked through the administrative action of the Department of Environmental Resources contrary to Petitioner's argument on appeal.

17. Admitted. In way of further answer, Commonwealth would note the Supreme Court granted allocatur since "the two courts are clearly in conflict and this leaves the Attorney General's Office ill advised on how it should proceed in such situations." 634 A. 2d 112 (Pa. 1993). In way further [sic] answer the Commonwealth would note that the Supreme Court did not state that defendant Fiore should be granted any relief in the *Scarpone* decision, and refused to grant relief on his application for extraordinary relief No. 9 W.D. 1992 and emergency application for extraordinary relief at No. 7 W.D. 1994.

18. Admitted.

19. Denied. At this time, the Commonwealth has no knowledge of the aforementioned averment.

20. Admitted.

21. Admitted.

22. Admitted that defendant did not preserve the present issue. However, it is denied that this motion may be treated as an issue of ineffective assistance of prior counsel since a bald allegation of ineffectiveness will not be entertained in a PCRA proceeding. See *Commonwealth vs. Korb*, 617 A.2d. 715 (Pa. Super. 1992); *Commonwealth vs. Austin*, 417 A.2d. 1220 (Pa. Super. 1980).

23. It is denied that *Berger vs. United States* is applicable to the present situation.

24. While it is admitted that opposite conclusions were reached by the Commonwealth Court and Superior Court, it is denied that defendant Fiore is entitled to any relief pursuant to paragraphs 16, 17 and 22.

25. Denied.

26. Denied, on the contrary, petitioner's conviction was upheld at 485 Pgh 1988 and Allocatur was denied at 27 W.D. Misc. Docket 1987.

27. Denied. In way of further answer, the Commonwealth would note that the only remedy which would be available to defendant Fiore if this Honorable Court would be persuaded to retroactively apply *Scarpone*, would be to be resentence the petitioner pursuant to *Commonwealth vs. Goldhammer*, 517 A.2d. 1280 (Pa. 1986). However, the Commonwealth once again avers that the defendant is not entitled to any relief since the issues raised in the present petition have been finally litigated.

WHEREFORE, the Commonwealth respectfully requests this Honorable Court to deny the instant petition without a hearing.

RESPECTFULLY SUBMITTED,

ERNEST D. PREATE, JR.
Attorney General

BY: /s/ Frank J. Grzywinski
FRANK J. GRZYWINSKI
Deputy Attorney General

MARK A. BELLAVIA
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that the Commonwealth's Response to Defendant's Motion for Post Conviction Relief has been served on the following counsel via first class mail, postage pre-paid on May 26, 1994.

Harold Gondalman, Esquire
38th Floor, One Oxford Centre
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ERNEST D. PREATE, JR.
Attorney General

BY: /s/ Frank J. Grzywinski
FRANK J. GRZYWINSKI
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COMMONWEALTH of Pennsylvania

v.

William FIORE, Appellant.

Superior Court of Pennsylvania.

Argued March 22, 1995.

Filed Sept. 20, 1995.

Harold Gondelman, Pittsburgh, for appellant.

John M. Popilock, Deputy Attorney General, Harrisburg, for Commonwealth, appellee.

Before ROWLEY, President Judge, and KELLY and HOFFMAN, JJ.

ROWLEY, President Judge:

Appellant, William Fiore, appeals from the trial court's order of August 18, 1994, denying his petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 et seq. At the heart of this appeal is the fact that although appellant's employee and co-defendant, David Scarpone, has obtained from the courts of this Commonwealth a reversal of his conviction on the charge of operating a hazardous waste facility without a permit, appellant has failed to obtain the same relief. Such a result, appellant contends, deprives him of the due process of law and the equal protection of the laws and subjects him to cruel and unusual punishment.

Appellant maintains that, under the PCRA, we are empowered to grant the relief that he seeks in the form of a writ of coram nobis. After a careful review of the record and appropriate case law, however, we conclude that the relief sought by appellant is not available from this Court.

Appellant's argument rests on a complex procedural history. Appellant, owner of Municipal and Industrial Disposal Company (MIDC), a waste disposal facility, was charged with over 150 criminal and environmental law violations under the Solid Waste Management Act (SWMA), 35 P.S. § 6018.101 et seq., and related statutes. Scarpone, appellant's employee and general manager, was also charged with various violations, including conspiracy, 18 Pa.C.S. § 903, and obstructing the administration of law or other governmental function, 18 Pa.C.S. § 5101. Both individuals were charged with violating 35 P.S. § 6018.401(a), operating a hazardous waste disposal facility without a permit,[1] the offense at issue in this

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[1] § 6018.401. Management of hazardous waste

(a) No person or municipality . . . shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the [D]epartment [of Environmental Resources]. . . .

35 P.S. § 6018.401(a). The Commonwealth proceeded against Scarpone on a theory of accomplice liability under § 6018.610, which reads in pertinent part as follows:

It shall be unlawful for any person or municipality to:

. . . .

(9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

35 P.S. § 6018.610(9). *See Scarpone v. Commonwealth*, 141 Pa.Commw. 560, 596 A.2d 892 (1991), discussed infra.

appeal. This offense is a felony of the second degree pursuant to § 6018.606(f).[2]

In February 1986, appellant and Scarpone were jointly tried by a jury in a trial limited to charges against both defendants. Both were found guilty of violating § 6018.401(a), among other charges. In a non-jury trial in July, 1986, appellant was tried on those charges which did not involve Scarpone. This trial also resulted in appellant's conviction of, *inter alia*, violating § 6018.401(a). As a result of both trials, appellant was convicted on a total of sixty counts. Post-trial motions were filed and denied.

A single proceeding was held on April 10, 1987, for the imposition of sentence on appellant's convictions resulting from both trials. Although appellant had been convicted on sixty counts, the trial court sentenced him on only the following three:

> Count 1, Trial 1 (violating § 6018.401(a)): two and one-half to five years imprisonment, ten years probation, and a fine of $100,000;

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[2] § 6018.606 Criminal penalties

. . . .

(f) Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both.

35 P.S. § 6018.606(f) (footnote omitted).

Count 2, Trial 2 (violating § 6018.401(a)): two and one-half to five years imprisonment and ten years probation, to run consecutive to the sentence imposed at Count 1, and a fine of $100,000; and

Count 5, Trial 1 (perjury, 18 Pa.C.S. § 4902): one to two years imprisonment and five years probation, to run consecutive to the previous sentences.

The trial court explained that "I do not mean to minimize the other counts. We feel that this penalty is severe and we therefore direct the Clerk to enter no further penalty on all remaining counts." Notes of Testimony at 69-70. Appellant filed a motion to modify sentence, which was denied. Appellant then appealed to this Court.

On September 28, 1987, this Court, acting sua sponte and citing the Commonwealth Court's exclusive jurisdiction over appeals involving criminal proceedings arising from violations of regulatory statutes administered by Commonwealth agencies, 42 Pa.C.S. § 762(a)(2)(ii), transferred appellant's appeal to the Commonwealth Court. Appellant petitioned the Commonwealth Court to return his appeal to this Court. The Commonwealth Court granted appellant's petition on February 29, 1988, noting that the facts and issues of the present appeal were closely related to another appeal taken by appellant to this Court.

In an unpublished memorandum decision filed May 12, 1989, this Court affirmed appellant's judgment of sentence. *Commonwealth v. Fiore*, 391 Pa.Super. 634, 563

A.2d 189 (1989) 485 Pittsburgh 1988. Noting that appellant had raised 22 issues on appeal, all of which had been addressed by the trial court in a comprehensive opinion, the Court affirmed on the trial court's opinion. Because appellant had failed to include in his brief a statement pursuant to Pa.R.A.P. 2119(f) and the Commonwealth had objected to its omission, the Court also quashed the appeal insofar as it involved the alleged excessiveness of the sentence.

Appellant then petitioned the Supreme Court for allowance of appeal. In an order entered March 13, 1990, the Supreme Court denied the petition (No. 310 W.D. Alloc.Dkt.1989), thereby concluding appellant's direct appeal.[3]

Meanwhile, Scarpone appealed to this Court from his judgment of sentence. As was the case with appellant, this Court transferred the appeal sua sponte to the Commonwealth Court. Scarpone did not seek to have the appeal returned to this Court.

In a decision filed on August 5, 1991, more than a year after the conclusion of appellant's direct appeal, the Commonwealth Court reversed Scarpone's conviction on

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[3] We note that in appellant's PCRA petition, to be discussed *infra*, counsel for appellant states that the petition for allowance of appeal in the present case "was filed with the Supreme Court of Pennsylvania to No. 507 W.D. Allocatur Docket, 1989, which petition was denied on August 1, 1991. . . ." The docket number and date supplied by counsel are incorrect; counsel has confused the petition for allowance of appeal in this case with the petition for allowance of appeal filed by appellant (and denied) in a different appeal.

the charge of causing and assisting in the operation of a hazardous waste facility without a permit, as well as his conviction on the related charge of conspiracy. *Scarpone v. Commonwealth*, 141 Pa.Commw. 560, 596 A.2d 892 (1991). The Court held that the Department of Environmental Resources had issued a valid permit to MIDC, the waste facility in question. The Court reasoned that the alteration of a monitoring pipe, although a clear violation of the condition of the permit, did not result in the operation of a new facility that did not have a permit. Because MIDC had a valid permit, the Court held, Scarpone could not be convicted of causing and operating a waste disposal plant without a permit. The Court confirmed Scarpone's conviction on the charge of obstructing the administration of law or other governmental function.

Scarpone petitioned the Supreme Court for allowance of appeal in order to challenge the affirmance of his conviction on the obstruction charge. The Commonwealth, seeking to challenge the reversal of Scarpone's conviction on the permit charge, filed a cross-petition for allowance of appeal. The Supreme Court granted both petitions.

Although appellant's direct appeal was already concluded, he filed with the Supreme Court an application for extraordinary relief (No. 9 W.D.Misc.Dkt.1992), asking the Court to take jurisdiction of his case pursuant to the Court's King's Bench powers, 42 Pa.C.S. § 726, and to consolidate it with Scarpone's appeal "so that a uniform interpretation in the Commonwealth of the Solid Waste Management Act and the penal provisions thereunder will be obtained." Application for Extraordinary Relief at 5. The Court denied the application on March 25, 1992.

In an opinion filed on December 15, 1993, the Supreme Court affirmed the Commonwealth Court's decision in Scarpone's case. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993). The Court explained the situation as follows:

> We granted review in this case because of a conflict between the intermediate appellate courts in deciding the permit issue. Scarpone and his co-defendant Fiore were both charged with and found guilty of operating without a permit.
>
> Scarpone took his appeal to the Commonwealth Court and that court found it impossible to conclude that the alteration of the pipe resulted in the operation of a new facility for which no permit had been issued. Although the facility may have acted in breach of the permit it held, the court would not hold that this was tantamount to acting without any permit.
>
> Fiore took his appeal to the Superior Court and raised the issue by way of a sufficiency of the evidence argument. The Superior Court found the evidence sufficient and issued an unpublished memorandum opinion upholding his conviction of operating a hazardous waste facility without a permit. The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations.
>
> We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit. A more appropriate charge may have been brought under alternative provisions of the

statute. . . . [T]he SWMA has specific provisions providing a penalty for violations of the conditions of a permit. Under such circumstances, the Commonwealth must adhere to the legislative scheme in pursuing criminal charges. The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 Pa.C.S. § 1928(b)(1).

We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one.

Id. at 278-29, [sic] 634 A.2d at 1112 (emphasis in original). The Supreme Court affirmed Scarpone's conviction on the charge of obstructing the administration of law.

On January 27, 1993, appellant filed an "emergency application for extraordinary relief" (No. 7 W.D.Misc. Dkt.1994) with the Supreme Court. Again he urged the Court to utilize its King's Bench powers "to correct the anomalous situation of [appellant's] employee being discharged of criminal conduct under the identical facts and circumstances causing [appellant] to be imprisoned." Emergency Application for Extraordinary Relief at 9-10. The Supreme Court denied appellant's emergency application on March 22, 1994.

Appellant then filed the petition for post-conviction relief which has led to the present appeal.[4] In his PCRA petition, appellant urged the trial court to vacate the sentences imposed on the charges of operating a hazardous waste facility without a permit because "[w]hat [appellant] is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." *Id.* at 6. In an order entered August 18, 1994, the trial court denied appellant's petition for post-conviction relief. This timely appeal followed.

We turn first to appellant's contention that the common law remedy of a writ of coram nobis continues to be available under the PCRA and that he is entitled to that remedy. The term "coram nobis" is defined as "in our presence" or "before us," and "[t]he essence of coram nobis is that it is addressed to the very court which renders the judgment in which injustice is alleged to have been done, in contrast to appeals or review directed to another court. . . . " Black's Law Dictionary 304-05 (5th ed. 1979). In 1945 this Court explained the nature of the writ as follows:

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[4] The trial court states that this is appellant's second collateral attack on his conviction, the first having been a petition for writ of habeas corpus filed on appellant's behalf by Allen Brunwasser, Esq., on July 17, 1989, and denied by the trial court on October 24, 1989. This petition was essentially a challenge to the revocation of appellant's bond. Even if we were to apply to the present request for post-conviction relief the heightened standard set forth in *Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988), for a second or any subsequent such petition, the result in this case would be unchanged.

> The writ of error coram nobis is an ancient common law writ, the purpose of which is to bring before a court a judgment previously rendered by it for review or modification, on account of some error of fact and not of law affecting the validity and regularity of the proceedings, and which was not brought into the issue at the trial thereof.

Commonwealth v. Morrison, 158 Pa.Super. 311, 313, 44 A.2d 850, 851 (1945) (citation omitted; emphasis added). This Court suggested that the writ would lie, for example, where the error concerned the status of a party, such as an infant, or where an accused was forced to plead guilty owing to a well-founded fear of mob violence. *Id.* The Supreme Court has emphasized that the writ of error coram nobis "is a procedural tool whose 'purpose . . . is to correct errors of fact only. . . . ' " *Commonwealth v. Mangini*, 478 Pa. 147, 163, 386 A.2d 482, 490 (1978), quoting *Commonwealth v. Orsino*, 197 Pa.Super. 306, 313-14, 178 A.2d 843, 846 (1962). Moreover,

> [a] review of the cases in which the writ of coram nobis has been successfully invoked shows that the true rule governing the use of the writ is that one which is aptly expressed in section 94 of Freeman on Judgments, quoted in *Sanders v. State*, 85 Ind. 318, 44 Am.Rep. 29, 35, as follows: "The writ of error coram nobis is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication, made while some fact existed which if before the court would have prevented the rendition of the judgment, and which without any fault or negligence of the party was not presented to the court."

Commonwealth v. Harris, 351 Pa. 325, 329-30, 41 A.2d 688, 691 (1945) (emphasis added). The writ of error coram nobis is generally regarded as an extraordinary remedy. *Commonwealth v. Mangini, supra*. It is not issued, for example, simply because a witness later recants or changes his or her testimony, for "there would be no finality to any conviction of crime if verdicts and judgments could be thus easily nullified." *Commonwealth v. Mathews*, 356 Pa. 100, 102, 51 A.2d 609, 610 (1947), cited in *McKnight v. Commonwealth, Department of Transportation*, 121 Pa.Commw. 28, 549 A.2d 1356, 1358-59 (1988).

The case law just cited suggests that even if the remedy of coram nobis were available to appellant in the present procedural context, he would nevertheless not qualify for it because the issue that he raises is not a factual one. However, in support of his claim that he is entitled, via his PCRA petition, to the remedy of coram nobis, appellant directs us to the opinions of the Pennsylvania Supreme Court in *Commonwealth v. Sheehan*, 446 Pa. 35, 285 A.2d 465 (1971), and *Commonwealth v. Conner*, 462 Pa. 282, 341 A.2d 81 (1975).

In *Sheehan*, the appellant, while not represented by counsel, pled guilty to a charge of driving while intoxicated and paid a fine of $200. When he was charged with a second such offense five years later and learned that conviction for a second offense would merit a term of imprisonment, he petitioned for relief pursuant to the then-effective Post Conviction Hearing Act (PCHA), predecessor to the PCRA, asserting that his first conviction was invalid because his constitutional right to counsel had been denied. The trial court denied the petition,

noting that appellant failed to meet the PCHA's requirement that, to be eligible for relief, a petitioner must be incarcerated or on probation or parole. This Court affirmed.

On appeal to the Supreme Court, appellant argued that if his claim was not cognizable under the PCHA, his petition should be treated as one for a writ of coram nobis or habeas corpus. The Supreme Court observed that

> [t]he intent of the [Post Conviction Hearing] Act . . . was not to abolish the common law remedies of habeas corpus or coram nobis, but rather to promulgate an exclusive, well-defined procedure for the presentation of those grievances set forth in the Act by an aggrieved person who is under the duress of punishment, whether in prison or on parole or probation. All claims previously cognizable on a common law writ, in circumstances not covered by the terms of the Act, may still be litigated by means of the common law writ.

Sheehan, 446 Pa. at 39, 285 A.2d at 467 (citations and footnote omitted). After noting the limited scope of coram nobis, the Court took guidance from the Supreme Court of the United States:

> [A]fter noting that courts should act by whatever procedural channels appear necessary to do justice when the record makes plain a right to relief, the United States Supreme Court in *United States v. Morgan*, 346 U.S. 502, 505, [74 S.Ct. 247, 249], 98 L.Ed. 248, 253 (1954)[,] held that, on an allegation of the denial of right to counsel, coram nobis would lie to challenge a conviction, the sentence of which had been fully satisfied. The Court laid particular emphasis on

> a quotation from 2 Tidd's Practice (4th Am.Ed.) 1136, 1137, which stated that coram nobis is available to cure errors of fact or process. *See* [Judge Hoffman's dissenting opinion in *Commonwealth v. Sheehan*, 216 Pa.Super. 26, 260 A.2d 496 (1969),] and cases cited therein. Likewise, the Court in Morgan noted that coram nobis as applied in American jurisdictions had not been confined strictly to matters of fact.

Id. at 40, 285 A.2d at 468. Our Supreme Court concluded that appellant's petition should be treated as a petition for a writ of coram nobis and remanded the case to the trial court for a hearing to determine whether appellant had knowingly waived his right to counsel.

The appellant in *Conner* sought relief in the form of a writ of coram nobis after his direct appeal from a judgment of sentence for voluntary manslaughter proved unsuccessful. The trial court denied the relief sought. On appeal, the Supreme Court acknowledged that appellant should have sought relief under the PCHA. Nevertheless, because the trial court had considered the merits of appellant's claims, the Supreme Court decided in the interest of judicial economy to treat the claims as having been raised under the PCHA. In doing so, the Court relied upon its earlier opinion in *Sheehan* and upon the reasoning of the United States Supreme Court in *Morgan, supra*, that "courts should act by whatever procedural channels appear necessary to do justice when the record makes plain a right to relief." *Conner*, 462 Pa. at 286, 341 A.2d at 83.

This Court subsequently interpreted the Supreme Court's decision in *Sheehan* as having "expanded the

scope of a writ of coram nobis in Pennsylvania from being restricted to challenges on the validity of a judgment based on facts not previously before the court, to include matters of law." *Commonwealth v. Fay*, 294 Pa.Super. 332, 336, 439 A.2d 1227, 1229 (1982). *See also Commonwealth v. Bucci*, 283 Pa.Super. 125, 423 A.2d 747 (1980) (PCHA did not abrogate common law writs which cover situations not covered by PCHA); *Commonwealth v. Mervin*, 263 Pa.Super. 498, 398 A.2d 687 (1979) (writ of error coram nobis still exists, but has been supplanted by PCHA except in rarest situation).

Appellant is not proceeding under the PCHA, however, but under its successor statute, the PCRA, which went into effect April 13, 1988. This Court *en banc* has observed that

> [t]he PCRA . . . is a complete amendment to the prior post conviction relief statute[,] the [PCHA]. A review of the modifications and amendments to the PCHA shows that almost the entire statutory language of the PCHA was stricken and replaced by new language in the PCRA.

Commonwealth v. Hayes, 408 Pa.Super. 68, 72, 596 A.2d 195, 197 (1991) (*en banc*), *appeal denied*, 529 Pa. 646, 602 A.2d 856 (1992). Accordingly, we are required to decide whether coram nobis survives as an alternative remedy outside of the PCRA.

We note, first, a difference in the wording of the sections setting forth the scope of the former and the present statutes. The drafters of the PCHA described its scope as follows:

> This subchapter establishes a post conviction procedure for providing relief from convictions obtained and sentences imposed without due process of law. The procedure established in this subchapter shall encompass all common law and statutory procedures for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis. However, nothing in this subchapter limits the availability of remedies in the trial court or on direct appeal.

42 Pa.C.S. § 9542 (repealed) (emphasis added). The drafters of the PCRA chose the following language:

> This subchapter provides for an action by which persons convicted of crimes they did not commit or serving unlawful sentences may obtain collateral relief and for an action by which persons can raise claims which are properly a basis for Federal habeas corpus relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis. This subchapter is not intended to limit the availability of remedies in the trial court or on direct appeal from the judgment of sentence, nor is this subchapter intended to provide a means for raising issues waived in prior proceedings.

42 Pa.C.S. § 9542 (emphasis added).

In *Commonwealth v. Hayes, supra*, this Court *en banc* addressed the significance of the change in wording. In that case, as in *Sheehan*, the defendant filed a petition for

post-conviction relief in order to challenge a conviction, the sentence for which had expired, but which had led to a collateral consequence in the form of an increased sentence for a later offense. The eligibility provision of the PCHA had required that a petitioner be "incarcerated in this Commonwealth under a sentence of death or imprisonment or on parole or probation." 42 Pa.C.S. § 9543(2). Because the appellant was proceeding under the PCRA, however, he was required to be "currently serving a sentence of imprisonment, probation or parole for the crime. . . . " 42 Pa.C.S. § 9543(a)(1)(i).

In analyzing this change, the Court first applied two principles of statutory interpretation: 1) general and plain words must be given their common and accepted meaning; and 2) it must be assumed that the drafters of a statute intende every word of it to have effect. The conclusion reac was that "the language changes in the PCRA were deliberately made to confront and alter the collateral criminal consequences rule" and that to interject that rule into the PCRA would mean ignoring "the legislative intent and the plain meaning of the word changes made in the PCRA." *Id.* at 76, 596 A.2d at 199 (footnote omitted).

As further support for its conclusion, the Court pointed to the legislature's decision to declare a petition pursuant to the PCRA "the sole means of obtaining collateral relief. . . . " 42 Pa.C.S. § 9542 (emphasis added). "This statutory language clearly evidences a legislative intent to change the prior decisional law and restrict the scope of collateral post conviction challenges." *Id.* at 77, 596 A.2d at 200.

Although this Court *en banc* was not directly presented in Hayes with the question whether the common law writ of coram nobis survives as a post-conviction remedy outside the PCRA, the conclusion that the writ does not survive follows directly from the Court's interpretation of the drafters' intent. If we were to allow appellant to petition for a writ of coram nobis without satisfying the eligibility requirements of the PCRA, we will have created a second means of obtaining collateral relief, thereby contravening the legislative intent that the PCRA be the sole means of obtaining such relief. Accordingly, we conclude that appellant is not eligible for post-conviction relief in any form unless he meets the eligibility requirements set forth in the PCRA.

One such requirement is the obligation to plead and prove by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a)(3). Section 9544 explains in pertinent part that "an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. . . . " 42 Pa.C.S. § 9544(a)(2).

We agree with the trial court that appellant has failed to meet this requirement. As noted earlier, this Court disposed of the twenty-two issues raised in appellant's direct appeal by affirming on the trial court's opinion. The trial court addressed the present issue in the following terms:

> The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the [DER] for such disposal facility.

> In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system . . . and, as such, the existence of that permit constitutes an absolute defense to the charges. We find the defendant's contention unpersuasive.
>
> . . . .
>
> [T]he defendant's alterations of the 810 pipe represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was "unpermitted" after the alterations were undertaken by the defendant. Contrary to the defendant's contention, he did not possess all necessary permits; specifically, he did not possess a permit which allowed the disposal of hazardous waste after the monitoring system was altered. Therefore, we reject the defendant's contention as incorrect.

Trial Court Opinion, 1/19/88, at 44-48. The Supreme Court declined to allow appellant to appeal from this Court's decision. Appellant now asks this Court to grant him, in a post-conviction proceeding, the relief that was denied him on direct appeal. It is settled law that an issue litigated on direct appeal cannot be litigated again in a post-conviction proceeding. *Commonwealth v. Szuchon*, 534 Pa. 483, 486, 633 A.2d 1098, 1099 (1993). Accordingly, appellant is not entitled to relief under the PCRA.

In reaching this result, we have not overlooked the uniqueness of appellant's situation. Appellant was convicted of operating a waste management facility without a permit, and his conviction was affirmed. His general

manager, David Scarpone, was convicted of the same offense, and his conviction was reversed because, the appellate courts concluded, he had a permit. The permit in question was the same, however; it was appellant's as well as Scarpone's. Unsurprisingly, appellant views the situation as unjust.

Nevertheless, the crucial fact is that appellant's direct appeal was no longer pending when the Supreme Court made the ruling which appellant now seeks to have applied to his case. In *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986), our Supreme Court considered "whether full retroactivity of a case encompasses a collateral attack on the conviction." *Id.* at 354, 516 A.2d at 1181. The Court held that

> a new rule of law to which we give full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue was properly preserved there, or . . . is non-waivable.

Id. at 355, 516 A.2d at 1183.[5] *Accord Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994); *Commonwealth v. Galloway*, 433 Pa.Super. 222, 640 A.2d 454 (1994), *appeal denied*, 538 Pa. 666, 649 A.2d 668 (1994); *Commonwealth v. Riggins*, 374 Pa.Super. 243, 542 A.2d 1004 (1988), *appeal denied*, 522 Pa. 583, 559 A.2d 527 (1989); *Commonwealth v. Carr*, 370 Pa.Super. 1, 535 A.2d 1120 (1987), *appeal denied*, 518 Pa. 648, 544 A.2d 960 (1988). In *Galloway*, for example,

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[5] Although the Supreme Court's opinion was not joined in its entirety by a majority of the panel, a majority joined the Court's ruling on the question of retroactivity.

this Court held that a defendant whose conviction became final when the Supreme Court affirmed his judgment of sentence on September 24, 1981, was not entitled to post-conviction relief based on a ruling set forth in an opinion filed by the Supreme Court on October 19, 1981, barely a month later. We conclude, therefore, that there is no support in the case law of this Commonwealth for the result sought by appellant in this case.

Finally, we note that appellant has presented to the Supreme Court, via two petitions for extraordinary relief, the same issue that he raises here, and that the Supreme Court has denied both petitions without explanation. On this point, the trial court offered the following observation:

> This court cannot divine the reason why the Supreme Court has consistently and repeatedly denied extraordinary relief to [appellant] despite its decision in Scarpone. If it is because there must be some finality to these matters, and [because] justice does not require extraordinary relief, then this court concurs.

Trial Court Opinion, 2/17/95, at 8. To this we add the observation that 42 Pa.C.S. § 726, which confers extraordinary jurisdiction on the Supreme Court, does so only "in any matter pending before any court . . . of this Commonwealth . . . " (emphasis added).[6]

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[6] Section 726 reads in its entirety as follows:

> Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 Pa.C.S. § 726.

Most importantly, we are cognizant that "[t]he formal purpose of the Superior Court is to maintain and effectuate the decisional law of [the Supreme] Court as faithfully as possible." *Commonwealth v. Dugger*, 506 Pa. 537, 545, 486 A.2d 382, 386 (1985). Doing so in this case requires that we affirm the trial court's order denying appellant's petition for post-conviction relief.

Order affirmed.

HOFFMAN, J., files a concurring statement.

HOFFMAN, Judge, concurring:

As appellant's direct appeal was final when the Supreme Court decided *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), and as his claim had already been previously litigated, I agree with my distinguished colleagues that appellant is not eligible for relief under the PCRA. *See* 42 Pa.C.S. § 9543(a)(3); Pa.C.S. § 9544; *Commonwealth v. DeHart*, 539 Pa. 5, 650 A.2d 38 (1994) (issues previously litigated may not be relitigated in PCRA action); *Commonwealth v. Gillespie*, 512 Pa. 349, 355, 516 A.2d 1180, 1183 (1986) (new rule of law will not be applied retroactively after appellant's direct appeal is final).

However, I write separately to emphasize that there are circumstances where a departure from the PCRA's stringent eligibility requirements is appropriate, such as

where there are extraordinary circumstances or a miscarriage of justice. *See Commonwealth v. Szuchon*, 534 Pa. 483, 633 A.2d 1098 (1993) (where a strong prima facie showing is offered to demonstrate that a miscarriage of justice occurred, a subsequent petition for post-conviction relief will be entertained); *Commonwealth v. Lyons*, 390 Pa.Super. 464, 568 A.2d 1266 (1989) (extraordinary circumstances may overcome petitioner's failure to raise issue below), *appeal denied*, 525 Pa. 663, 583 A.2d 792 (1990).

In the instant case, the evidence at trial clearly demonstrated that appellant deliberately altered the groundwater monitoring system, wrongfully discharged hazardous waste into an unnamed tributary of the Youghiogheny River, and lied under oath to the Commonwealth Court. Although appellant is serving a sentence for a conviction based upon evidence which would no longer support a conviction in Pennsylvania, I believe appellant's conviction was not a miscarriage of justice or an extraordinary circumstance warranting a departure from the provisions of the PCRA.

Accordingly, I concur.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, vs. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	)	Case No. 961231

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

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PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

1. Name and location of court which entered the judgment under attack: The Court of Common Pleas of Allegheny County.

2. Criminal Docket No. CC No. 85-08740.

3. Date of imposition of sentence. April 10, 1987.

4. Length of sentence: two consecutive sentences of 2 1/2 to 5 years each, each followed by a 10-year period of probation, plus fines and costs.

5. Nature of offense or offenses for which you were convicted: Violation of the Solid Waste Management Act, 35 P.S. §§ 6018.401(a), 6018.601(f).

6. What was your plea? Not guilty

7. The finding of guilt was made by a jury.

8. Did you testify at the trial? Yes X No _

9. Did you appeal from the judgment of conviction? Yes.

10. (a) Appellate procedures:

a. Petitioner appealed sentence to Superior Court of Pennsylvania at Docket No. 646 Pittsburgh, 1987.

b. Superior Court *sua sponte* transferred Fiore appeal to Commonwealth Court.

c. Appeal transferred back to Superior Court and docketed at No. 485 Pgh. 1988.

d. Fiore's appeal to Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum Opinion, at *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989)

e. Fiore petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was denied on March 13, 1990 at No. 310 W.D. Alloc Dkt. 1989.

f. Fiore filed a "Emergency Petition for Extraordinary Relief" to the Supreme Court to take jurisdiction of his case and consolidate it with the Scarpone appeal so there would not be conflicting results. That application was denied on March 25, 1992 at No. 9 W.D. Misc. Dkt. 1992.

g. On or about January 27, 1994, Fiore filed an "Emergency Petition for Extraordinary Relief" to the Supreme Court of Pennsylvania at 7 W.D. Misc. Dkt. 1994." The Supreme Court again denied petition.

(b) No petition for certiorari filed with the United States Supreme Court.

11. Other than direct appeal from the judgment of conviction and sentence other applications and motions which have been filed with respect to this judgment.

a. On or about March 28, 1994, Fiore filed a Motion for Post Conviction Collateral Relief with the Court of Common Pleas of Allegheny County, at Criminal Division: CC NO. 8508740. By Order dated August 18, 1994, the Court of Common

Pleas denied Fiore's post conviction petition.

b. On or about August 29, 1994, Petitioner filed a direct appeal to the Commonwealth Court from the Court's denial of his Petition for Post Conviction Relief by Order dated August 18, 1994 at No. 1892 Pgh 1994. The Commonwealth Court transferred the case to the Superior Court on the Commonwealth's motion. The Superior Court affirmed the conviction.

c. On or about October 18, 1994, petitioner filed yet another "Emergency Application for Extraordinary Relief, or, in the alternative, a Petition for Review" at 107 W.D. Misc. Docket 1994, wherein petitioner again urged the Supreme Court of Pennsylvania to invoke its Kings Bench powers and to set aside Fiore's conviction on the disputed count.

d. Superior Court denied appeal on September 20, 1995, *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995).

12. Grounds for relief:

Petitioner contends that:

(a) He is being held incarnated [sic] for conduct which the Supreme Curt [sic] of Pennsylvania has determined does not meet the elements of the crime charged; and

(b) He has been denied due process and equal protection by the Courts of Pennsylvania

wherein they have failed to afford him application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993).

Petitioner has requested application of the *Scarpone* decision to his case in all levels of the Pennsylvania court system. To the extent he did not specifically raise the denial of his right to due process and equal protection, that issue was not ripe until he has exhausted all avenues of relief, and been denied. It would be futile for him to return to the state court system with this claim in light for the courts' previous decisions.

13. Were you sentenced on more than one count on any indictment, or more than one indictment, in the same court and at the same time.

Yes (X) No ( )

14. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes (X) No ( )

(a) If so, give name and location of court which imposed sentence to be served in the future: Westmoreland County Court of Common Pleas.

(b) And give date and length of sentence to be served in the future: at the expiration of this sentence, 5-10 years.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes (X) No ( )

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

Executed at _____.
(City, County, State)

I, _____, declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
(Date)

/s/ William Fiore
(Signature of Petitioner)

(Note: No Notary Certification Required)

Supreme Court, U.S.
FILED
MAY 11 1999
CLERK

No. 98-942

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

v. *Petitioner,*

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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Certiorari Granted March 29, 1999

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, vs. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	)	Case No. 961231

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

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I. INTRODUCTION

William Fiore owned and operated a hazardous waste facility in western Pennsylvania under permit from the state's Department of Environmental Resources ("DER"). He, together with his employee Dave Scarpone, was charged with various criminal counts, including the operation of a hazardous waste disposal facility *without a permit* in violation of the Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony. At a joint trial both defendants were convicted. Mr. Fiore was sentenced to a total of five to ten years in prison, fined $200,000.00 and placed on probation for twenty-five years. Each co-defendant appealed to the Superior Court of Pennsylvania. On its own motion the Superior Court transferred the appeals to the Commonwealth Court. On Mr. Fiore's motion, the Commonwealth Court transferred his appeal back to the Superior Court, but retained the Scarpone appeal.

Mr. Scarpone's appeal was decided by the Commonwealth Court in a reported case at *Commonwealth v. Scarpone*, 596 A.2d 892 (Pa. Commw. 1991), aff d 634 A.2d 1109 (Pa. 1993) (Ex. 1 and 2). The Commonwealth Court held that since Mr. Fiore had a permit to operate the facility, his employee Mr. Scarpone could not be convicted of operating a waste disposal facility *without a permit;* Mr. Scarpone's conviction was reversed.

Mr. Fiore's appeal to the Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum opinion, *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989).

The Commonwealth appealed the Commonwealth Court's decision in *Scarpone* to the Supreme Court of Pennsylvania. Petitioner appealed the Superior Court's decision.

The Supreme Court granted the Commonwealth's petition for allocatur in the *Scarpone* appeal. Mr. Fiore filed a petition to the Supreme Court, at No. 9 W.D. Misc. Dkt. 1992 (Ex. 3), to take jurisdiction of his case and consolidate it with the *Scarpone* appeal so as to avoid conflicting results. That application was denied on March 25, 1992. (Ex. 19)

The Supreme Court granted the Commonwealth's petition for allocatur in *Scarpone* so as to resolve the conflicting decisions between the Superior and Commonwealth Courts. The Court recognized the identity of the situations in *Scarpone* and *Fiore* when, in its opinion affirming the Commonwealth Court reversal of Mr. Scarpone's conviction, the Supreme Court held:

> The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations. We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Commonwealth v. Scarpone, 634 A.2d 1109 (Pa. 1993). It bears repeating that the permit which Mr. Scarpone had was the permit of his employer, William Fiore.

The Supreme Court determined that the Commonwealth had not made out the crime of operating a waste

disposal facility without a permit. It stated, "Simply put, Mr. Scarpone *did have a permit.*" (emphasis supplied)

The Supreme Court noted that a more appropriate charge against Scarpone and Mr. Fiore could have been brought under alternative provisions of the statute. That is, Mr. Fiore and/or Mr. Scarpone were alleged to have hired a welder to alter the direction of the flow of various hazardous waste material from the dump, which was contrary to the terms of the permit. Such conduct could have been charged under 35 P.S. § 6018.606(g) of the SWMA which makes it a first degree felony for any person to "intentionally, knowingly or recklessly restore, transport, treat, or dispose of hazardous waste within the Commonwealth in violation of any provision of the act, and whose acts or omissions cause pollution, a public nuisance or bodily injury to any person. The Court reasoned, however, that

> the alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility *without a permit* is a bald fiction we cannot endorse. Penal provisions of the statute must be strictly construed under 1 P. S. § 1928(b)(1). (emphasis in original)

Scarpone, 634 A.2d at 1112. Refusing to condone the "bald fiction", the Supreme Court affirmed the Commonwealth Court's reversal of Mr. Scarpone's conviction.

Thereafter Mr. Fiore filed an Emergency Application for Extraordinary Relief to the Supreme Court of Pennsylvania, at No. 7 W.D. Misc. Dkt. 1994, by which he requested the Court exercise its extraordinary King's

Bench powers, and give him the benefit of the Court's decision in *Scarpone*. That application was denied. (Ex. 19)

Mr. Fiore then filed a motion for post-conviction collateral relief with the trial court (Ex. 5). Mr. Fiore again requested that the Supreme Court's *Scarpone* decision be applied to him. The trial court denied the motion for post-conviction collateral relief and its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995) (Ex. 6).

The post-conviction court even admitted that Mr. Fiore was incarcerated on facts that, at the time of the post-conviction decision, did not constitute criminal activity. However, the post-conviction court refused to give retroactive application to the Supreme Court's *Scarpone* decision.

Mr. Fiore is presently incarcerated in the State Correctional Institution at Pittsburgh, Pennsylvania on a five to ten year sentence for committing acts which the Supreme Court of Pennsylvania, under identical facts, has specifically held were never criminal under the penal provisions charged.

II. LEGAL ISSUES RAISED

This case raises two related issues. The first is whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged. The second issue is whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him benefit of the Pennsylvania Supreme Court's

decision in *Scarpone*. That is, by refusing to give retroactive effect to that decision, Petitioner Fiore is serving and has served years incarcerated on the basis of facts which do not constitute the crime for which he was convicted.

III. FACTUAL BACKGROUND

The relevant facts presented are not in dispute. The essence of the charges against Mr. Fiore and Mr. Scarpone were that they criminally operated a hazardous waste facility without a permit.

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revocate or suspend that permit, or must it be worded so in the permit?" (Ex. 18)

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Petitioner's counsel suggested that the proper answer to both parts of the jury's question was "no", because pursuant to the Pennsylvania Administrative Code, § 1917(a) and 1921(a), no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal such revocations, suspension or modification to the Environmental Hearing Board. The Commonwealth's counsel argued that a permit is granted for a specific activity and if the permittee alters that activity so as to commit conduct which is "clearly beyond the pale of the four corners of the permit", then there is "no permit." Upon considering the argument of all counsel, the Court instructed the jury as follows:

THE COURT: Ladies and Gentlemen of the Jury: Your question is an indication to counsel and the court of the diligence with which you apply yourself to your responsibility. Your question focuses on a very intricate legal issue which is involved in this case, and we are not surprised that you focused on that issue in view of your application to your responsibility.

Your question is in two parts. The first part asks, "By law, does a permit violation automatically revocate or suspend that permit?" The answer to that question is no. The second part of the question is: "or must it be worded so in the permit?" The answer to that question is that it is not necessary that a permit as a matter of law specify all the ways in which it may be violated and thereby revoked. It does not have to specify the ways in which it may be violated or revoked.

In order to help you understand the allegations, I would like to amplify those answers.

Clearly, the MIDC facility had a permit to operate a hazardous waste facility. You know that's been made clear during the course of the case. And, as a matter of law, every violation of the conditions of that permit would not result. There is a way in which violations are handled. In fact, you heard testimony with regard to violations and the way those violations were handled.

The allegations in this case are that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an

unpermitted operation of a hazardous waste facility.

The question of fact for you to decide is, on what testimony will you hang your hat. In other words, whom you believe and whom you do not believe.

Secondly, was the violation or the alteration so substantial as part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit?

These are questions of fact for you to answer.

I hope that gives you some better understanding of the law and will help you reach a verdict in this matter.

You may return to deliberate.

Thereafter, the jury returned with a verdict of guilty as to both Mr. Fiore and Mr. Scarpone on the counts. Mr. Fiore was sentenced as set forth above.

IV. PROCEDURAL HISTORY

1. Petitioner charged in criminal information with, *inter alia*, two counts of violating the Solid Waste Management Act ("SWMA") and Clean Streams Law, in violation of 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony.

2. Petitioner was convicted of, *inter alia*, the following charges and, on April 10, 1987, was sentenced as follows:

> Count 1, Trial 1 (violating § 6018.401(a)): two and one half years to five years imprisonment, ten years probation, and a fine of $100,000; and,

> Count 2, Trial 2 (violating § 6018.401(a)): two and one half to five years imprisonment and ten years probation, to run consecutive to the sentence imposed at Count 1, and a fine of $100,000.

3. Co-defendant Scarpone was convicted and sentenced on the same charges.

4. Petitioner appealed the sentence to the Superior Court of Pennsylvania (Ex. 7).

5. Mr. Scarpone appealed the conviction and sentence to the Commonwealth Court.

6. The Superior court *sua sponte* transferred appeal of Mr. Fiore to Commonwealth Court. (Ex. 20)

7. The appeal of Mr. Fiore was transferred back to Superior Court. (Ex. 20)

8. Mr. Fiore's appeal to Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum opinion, *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989) (unpublished). (Ex. 5)

9. Mr. Fiore petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was denied on March 13, 1990 at No. 310 W.D. Allocatur Docket, 1989. (Ex. 8 and 19) This concluded Mr. Fiore's direct appeal.

10. On August 5, 1991, the Commonwealth Court reversed Mr. Scarpone's conviction, reasoning that the facility did not operate without a permit. *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), aff'd, 634 A.2d 1109 (Pa. 1993).

11. The Supreme Court granted the Commonwealth's petition for allocatur in *Scarpone*.

12. Mr. Fiore filed an Application for Extraordinary Relief to the Supreme Court to take jurisdiction of his case and consolidate it with the Scarpone appeal so as to avoid conflicting results. In that petition, Mr. Fiore pointed out the unfair result inherent in diametrically opposed decisions reached by the Commonwealth and Superior Courts. That application was denied on March 25, 1992 at No. 9 W.D. Misc. Dkt. 1992, thus letting stand the Superior Court's affirmance of Mr. Fiore's conviction. (Ex. 10)

13. In an opinion filed December 15, 1993, Supreme Court affirmed the Commonwealth Court's reversal of Mr. Scarpone's conviction, reported at *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). (Ex. 2)

14. January 27, 1994, Mr. Fiore again attempted to raise the issue of his fundamentally unfair treatment by filing a second "Emergency Petition for Extraordinary Relief" to the Supreme Court of Pennsylvania at 7 W.D. Misc. Dkt. 1994. (Ex. 4) Therein Mr. Fiore urged the Court to review this anomalous situation.

He argued, *inter alia*, that: "Under its King's Bench powers, this Court 'upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, [may] assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done. 42 Pa.C.S.A. § 726.' " The Supreme Court denied Mr. Fiore's petition on March 22, 1994. (Ex. 11)

15. On March 28, 1994, Mr. Fiore filed a Petition for Post Conviction Collateral Relief with the Court of Common Pleas of Allegheny County. (Ex. 12) Therein he again pointed out the anomalous factual situation of this case and urged the Court to vacate his conviction and sentence on the counts of operating a facility without a permit.

On or about August 18, 1994, the Court of Common Pleas denied Mr. Fiore's post conviction petition. In its opinion, the trial court stated:

> Counsel argued correctly that Fiore is currently serving a sentence for a conviction based upon evidence which today would no longer support a conviction in Pennsylvania. (Ex. 13)

16. In denying Plaintiff's Petition for Post Conviction Relief, the Court determined that his conviction was appropriate under the law in effect at the time of the conviction. Further, the Court concluded that the Supreme Court's later decision in the *Scarpone* matter did not change that fact and was not grounds for relief under Pennsylvania's Post Conviction Relief Act found at 42 Pa.C.S.A. § 9442.

17. On or about August 29, 1994, Petitioner filed a direct appeal to the Commonwealth Court from the Court's denial of his Petition for Post Conviction Relief by Order dated August 18, 1994. The Commonwealth Court transferred the case to the Superior Court on the Commonwealth's motion. (Ex. 14 and 15)

In that appeal, Petitioner raised the following issues:

I. A writ of error coram nobis lies to vacate sentences which Fiore is currently serving

of five to ten years where the court below in denying post-conviction relief admitted that Fiore is serving a sentence for a conviction based upon evidence which today would no longer support a conviction in Pennsylvania.

II. The employer is denied equal protection of the laws by the courts where Fiore's co-defendant/employee has been exonerated by the Commonwealth Court and Supreme Court of Pennsylvania from violating the law in operating a new hazardous waste facility without a permit because Fiore, the employer, in fact had a permit.

III. Fiore has been denied due process of law where the trial court and this Court, as well as the Attorney General of the Commonwealth of Pennsylvania, erroneously construed the environment protection laws to charge a crime which under the legislative scheme of things never constituted a crime.

IV. Fiore is being subjected to cruel and unusual punishment where he is serving a five to ten year sentence and is subject to $200,000.00 in fines as well as costs of prosecution and a 25-year probation for acts which never constituted a crime under the statutory scheme of things.

The Superior Court denied this appeal at *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa.Super. 1995) (filed September 20, 1995). (Ex. 6)

18. On or about October 18, 1994, petitioner filed another "Emergency Application for Extraordinary Relief, or, in the alternative, a Petition for Review" at 107

W.D. Misc. Docket 1994 (Ex. 16), wherein petitioner again urged the Supreme Court of Pennsylvania to invoke its King's Bench powers and to set aside Mr. Fiore's conviction on the disputed count. By that petition, petitioner revived his contention that he was being unfairly incarcerated under facts and law which the Supreme Court of Pennsylvania had concluded did not constitute a crime.

Although Mr. Fiore, through counsel, did everything to try to avoid the incongruous result that presently exists, he is still placed in the position of having to proceed by way of Writ of Habeas Corpus in the federal courts to seek justice and vindication of his right to due process and to be treated fairly in this matter. That Mr. Fiore's actions did *not* constitute a crime, has been specifically and clearly decided by the Supreme Court of Pennsylvania.

V. DISCUSSION

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a) Petitioner Fiore's conviction and incarceration run afoul of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution in that he is currently incarcerated on the basis of facts which the Supreme Court of Pennsylvania has ruled does not constitute a crime under the Pennsylvania Crimes Code.

Mr. Fiore is confined at the State Penitentiary under a sentence of 5 to 10 years, $200,000.00 in fines, costs, and

25 years probation for committing acts which the highest court of Pennsylvania found did not constitute a crime under the sections charged of the Solid Waste Management Act.

A. DENIAL OF DUE PROCESS AND EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws." (emphasis supplied). As the Supreme Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 846 (1948). At bottom, the Equal Protection Clause guarantees that local, state and the federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications which lead to invidious discrimination. *See Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S. Ct. 2941 (1979).

Not all differential treatments by government are proscribed; nor are all government-made classifications

or differential-treatments reviewed under the same standard. Statutes or actions which purposefully impair a fundamental right or deal with a "suspect classification," are subject to "strict scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973). Under this standard of review, the government-made classification or treatment is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972).

In the absence of either purposeful impairment of a fundamental right or suspect classification, a less rigorous standard of review is applied. This standard of review is often referred to as the "mere rationality" standard. *See Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911). When this standard is applied, the judicial inquiry is limited to ascertaining whether the classification in issue bears a rational relation to a permissible governmental objective. *See Cleburne, Texas*, 473 U.S. 432, 105 S. Ct. 3249; *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676 (1985); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911) (law will be stricken only if "purely arbitrary").

Involved here is impairment of Petitioner's fundamentally protected right to liberty.[1] Accordingly, the

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[1] The concept that personal liberty is a fundamental protected right underlies the basic reasoning for the federal habeas statute. In *Lehman v. Lycoming County Children's Services*, 648 F.2d 135 (3d Cir. 1981), the Court recognized that the primary purpose of federal habeas proceedings is to protect a

Commonwealth must establish a compelling reason for its refusal to treat Petitioner similarly to Mr. Scarpone.

The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct 2963, 2975 (1974). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). A penal statute "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976).

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citizen's fundamental right to be free of being wrongfully held in custody. It is the allegation of an unlawful restriction on personal liberties which compels the court to review an otherwise final decision; that is improper restrictions on personal liberties outweigh the otherwise compelling interest in the finality of litigation. *Id.* at 139.

As Justice Brennan wrote for the Supreme Court majority in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963):

> Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Id. at 424, 83 S.Ct. at 841.

The strength of the protected nature of individual freedom is such that courts even recognize that an individual on parole may be considered "in custody" for purposes of the habeas statute. *See Carafas v. La Vallee*, 391 U.S. 234, 242, 88 S.Ct. 1556, 1561 (1988) (referencing *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373 (1963)).

The facts as set forth clearly establish that Mr. Fiore has been treated dissimilarly from Mr. Scarpone, based on the evidence and law, and that the commonwealth has no compelling reason for this difference. Mr. Fiore petitioned the Supreme Court of Pennsylvania to exercise its extraordinary powers, no less than three times, so as to afford him treatment equal to that given Mr. Scarpone.

Case law, as set forth below, supports Petitioner's contention that he has been denied due process and equal protection of the law of Pennsylvania. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), the Court was faced with a factual situation similar to the one at bar in which on a writ of *coram nobis;* it was asked retroactively to apply a Supreme Court decision to a prior conviction. In deciding to grant the writ, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971) and determined that its decision was based on "the simple and universal rule that a judgement in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law" and that this is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Liguori*, 438 F-2d at 669.

Similarly, in *Davis v. United States*, 417 U.S. 333, 94 S.Ct 2298 (1974), the Court stated that if the habeas petitioner's contentions were true then his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a

circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305.

In *Davis* the petitioner was prosecuted and convicted for failure to report for military induction. In that case, the selective service board had declared him a delinquent and ordered the petitioner to report for induction, even though he had not been found acceptable for military service prior to that time. On direct appeal, the petitioner challenged the local board's application of various military regulations by which they ordered him to report for induction prior to having been found acceptable for service in the Armed Forces. While that appeal was pending, the Supreme Court of the United States announced its decision in *Gutknecht v. United States*, 396 U.S. 295, 90 S.Ct. 506 (1970), wherein it concluded that selective service regulations that accelerated the induction of delinquent registrants were punitive in nature and without legislative sanction. Accordingly, the appeals court remanded Davis's case back to the trial court for further review based on *Gutknecht*. Thereafter, the trial court determined that Davis's induction had not been accelerated because of his delinquency status.

While Davis's second appeal was pending, the Ninth Circuit decided *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which had facts virtually identical to those in *Davis*, including the trial court's decision that Fox's induction order was not accelerated by the duration of delinquency. On appeal, the Ninth Circuit reversed Fox's conviction on the authority of *Gutknecht*. The court of

appeals affirmed Davis's conviction and he commenced serving his sentence.

Davis subsequently filed a *habeas corpus* action in which he asserted that the *Fox* case had effected a change in the law and that its holding required that his conviction be set aside. The court of appeals determined that its decision on direct appeal was the law of the case and that its intervening decision in *Fox* would not be applied in a collateral attack on Davis's conviction. The Supreme Court granted certiorari and ruled that Davis could raise this issue by way of collateral attack, even though it was a matter of statutory construction, because the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and presented "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305 (citation omitted).

Finally, based on the facts in *Davis*, which are essentially the same as in the instant case, the Supreme Court concluded:

> In this case, the petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no

> room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

417 U.S. at 346-47, 94 S.Ct. at 2305 (internal citations omitted).

Here, as in *Davis*, Petitioner Fiore is incarcerated for actions that are not criminal, as determined by the highest court of Pennsylvania. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's rights to due process and the equal application of the law. Further, it constitutes a situation cognizable under the habeas corpus statute.

B. EXHAUSTION

A habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982). To demonstrate compliance, the petitioner must show that the claim he asserts in federal court has been "fairly presented" to the state courts. *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971); *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989). To be "fairly presented," the federal claim must be the substantial equivalent of that presented to the state courts. *Picard*, 404 U.S. at 278, 92 S.Ct. at 513; *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986). *See, generally, Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990).

As previously set forth, Petitioner diligently petitioned the courts of Pennsylvania to grant him the benefit of the Supreme Court's decision in *Scarpone*. Mr. Fiore has

exhausted all factual and legal issues raised herein in previous proceedings before the Pennsylvania Courts, including the Pennsylvania Supreme Court.

During the post-conviction proceedings the Commonwealth argued that Mr. Fiore waived his unequal treatment claim, but the facts do not support that contention. In state court proceedings, the Commonwealth contended that the issue Mr. Fiore raised on direct appeal, stated as an insufficiency of the evidence argument, was not the same argument made by Mr. Scarpone on direct appeal. Mr. Scarpone's direct appeal was stated in terms of the Commonwealth's failure to follow administrative procedure to revoke the permit.

To the extent the Commonwealth will raise this contention again, here, Petitioner suggests that this is a distinction without a difference. In fact, the Pennsylvania Supreme Court disregarded this difference in approach, and granted allocatur precisely because of the existence of two opposing decisions by the intermediate appellate courts. (Ex. 2)

In its habeas decision, the Court of Common Pleas disregarded the Commonwealth's attempted detour, and determined that Petitioner had previously litigated the issue of unfair and unequal application of the law and, thus, the issue was not waived. The post-conviction court's ruling which denied petitioner retroactive application of the Supreme Court's *Scarpone* decision was based entirely on the conclusion that Petitioner had no right to the benefit of a "new rule of law in any matter on collateral review unless the decision was handed down

during the pendency of the [petitioner's] direct appeal." (Ex. 13)

In denying Petitioner's appeal from the post-conviction court, the Superior Court noted that Petitioner, there appellant, had litigated (exhausted) the primary issue raised in his post-conviction petition, that he was unfairly convicted and sentenced for conduct which did not constitute a crime. (Ex. 15)

Petitioner's primary contention here is two-fold: first, Petitioner is being held incarcerated for conduct which was not criminal under the statutory section charged; second, that he has been denied constitutional procedural and substantive due process rights and the right to equal protection by the courts of Pennsylvania when they denied him retroactive benefit of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*.

The procedural record, as previously set forth, is clear that Petitioner has taken every conceivable step to raise and preserve this issue, both by way of Application for Extraordinary Relief to the Supreme Court of Pennsylvania, and again by a post conviction petition, the denial of which Petitioner appealed.

C. RETROACTIVE APPLICATION OF SCARPONE DECISION

The principal of nonretroactivity prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, ___ U.S. ___, 114 S.Ct. 948, 953 (1994)

(citing *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 1139 (1992)).

In 1989, the Supreme Court decided *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), in which it clarified how the question of retroactivity should be resolved for cases on collateral review. *Teague* involved a collateral challenge to the conviction of a black defendant by an all-white Illinois jury after the prosecutor used his ten peremptory challenges to strike blacks from the jury. Petitioner filed a writ of habeas corpus and asked the Court to extend the Sixth Amendment's fair cross-section requirement to petit juries. A plurality of the Court refused to reach the merits, holding that new rules of law should not be applied retroactively on collateral review. "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S.Ct. at 1075 (footnote onitted).

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070. Thus to determine whether a ruling is "new," this Court must "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the constitution." *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260 (1990).

It can be argued that this Court need not deal with the issue of retroactivity, because Mr. Fiore and his Co-

defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. However, if this Court does apply a retroactivity analysis, it must first determine if Petitioner is seeking the application of "new" rule. Even if the Court determines that the petitioner seeks the benefit of a new rule, the Court must decide whether that rule falls within one of the two narrow exceptions to the non-retroactivity principle. *See, Gilmore v. Taylor,* 508 U.S. 333, 113 S.Ct. 2112, 2113 (1993).

The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane,* 489 U.S. at 307, 109 S.Ct. at 1073 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *See, Saffle v. Parks,* 494 U.S. at 495, 110 S.Ct. at 1264. This second exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson,* 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), aff'd, 536 F.2d 1013 (3d Cir. 1976).

In determining whether the Supreme Court in *Scarpone* had issued a "new rule of law," we begin an analysis by review of that decision. The Court's succinct opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, the decision is simply based on the black letter principal that penal statutes must be strictly construed. The *Scarpone* decision is one of straight forward statutory construction; in no way does it revise or reverse previous case law, nor has the Commonwealth

posited such an argument. Moreover, this principal *itself* is embraced by statute. *See* 1 Pa. Cons. Stat. § 1928(b)(1).

Further, a review of Pennsylvania case law reveals no decisions upon which the Commonwealth could reasonably have relied in prosecuting Mr. Fiore under its interpretation of the law. The obvious result reached by state Supreme Court was first reached by the Commonwealth Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather only interpreted an existing statute. This construction is supported by decisions of the United States Supreme Court. For example, in *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875 (1987), the Supreme Court considered the scope of the mail fraud statute, 18 U.S.C. § 1341, which prohibits the use of mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The Court held that the mail fraud statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government.[2]

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[2] Petitioners in *McNally* had been charged with devising a scheme to defraud the citizens of Kentucky of their intangible right to have the state's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. The jury was instructed to convict if it found either of two schemes to exist. One scheme involved a deprivation of property rights, but the other involved only the deprivation of the intangible right to good government. The Supreme Court reversed the Petitioners' convictions because

Subsequent to the Supreme Court's decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett*, ___ F. Supp. ___ (No. 87-C-8978) (85 CR 284 1988) (Ex. 17), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of his petition was the Supreme Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals.

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a way consistent with the terms of the statute.

Other courts have collaterally set aside mail fraud convictions, based on the retroactive application of *McNally*. *See, United States v. Wade*, 672 F.Supp. 864, 875 n.5 (D.Md. 1987). The *Wade* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos:*

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may

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the jury had not been required to find that the state was defrauded of any money or property in order to convict.

> be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck*, 318 U.S. at 243, "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction os [sic] as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners' conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

United States v. Mandel, 672 F. Supp. 864, 873-874 (D.Md. 1987) (citations omitted). Likewise, in Pennsylvania, the courts may not create crimes, but rather are confined to a strict construction of the Criminal Code. *See*, 1 Pa. Cons. Stat. § 1928(b)(1); *Commonwealth v. Scarponè*, 634 A.2d 1109, 1112 (Pa. 1993) (penal provisions of a statute must be strictly construed).

Similarly in the instant case, the Pennsylvania Supreme Court's decision that Mr. Scarpone's [and Fiore's] conduct did not constitute a violation of the criminal charge imposed does not constitute a new rule of law.

The general rule against the retroactive effect of a "new" statement of law generally involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), and *Miranda v. Arizona*, 384 U.S. 436,

86 S.Ct. 1602 (1966).[3] As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are retroactively applied only if they affect the truth-finding process. Here, however, the Pennsylvania Supreme Court's ruling the [sic] *Scarpone* simply decided which of two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct, and critically what are the actual elements of the offense.

The Commonwealth cannot argue that it was surprised by the Supreme Court's decision. Indeed the very issue underlying this entire scenario, that is whether the permit was repudiated by Mr. Fiore's and Mr. Scarpone's actions, was raised during the course of the trial when the Judge was asked to clarify the instructions to the jury.

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[3] A review of the key federal cases in this area reveal the courts have systematically denied retroactive application of new criminal procedural rulings. In *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), the Court refused to apply the Fourth Amendment exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), retroactively. In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct 1967 (1967), the Court held that the right to counsel at line-ups afforded in *Wade v. United States*, 388 U.S. 218, 87 S.Ct. 1926 (1967), was applicable only to line-ups occurring after the date of the *Wade* decision. In *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969), accorded only prospective application to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), which excluded limits of non-authorized electronic surveillance. Informed consent rule in *Miranda v. Arizona*, not applied retroactively, *see Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966).

If this Court determines that *Scarpone* was a "new rule" then, Petitioner contends, this case falls within the first exception to the non-retroactivity rule. That is, the *Scarpone* decision determined that Mr. Fiore's primary conduct was beyond criminal sanction and, thus, he is entitled to benefit of that decision.

This exception to the non-retroactivity rule was fully explained in *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1171 (1971), wherein the Court first explained that nonretroactivity, as a general rule, applied to new " 'procedural due process' rules, that is, those applications of the constitution that forbid the government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior." *Id.* at 692, 91 S.Ct. at 1180. However, the *Williams* court explained,

> new "substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the Writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in

> freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

401 U.S. at 693, 91 S.Ct. at 1180 (footnotes omitted).

Mackey referred to that Court's earlier decision *United States v. United States Coin & Currency*, 401 U.S. 715, 91 S.Ct. 1041 (1971), in support of this quotation. In *United States Coin & Currency*, the Supreme Court ruled that its earlier decisions that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct could not constitutionally be held criminal.

Similarly here, Mr. Fiore's conduct, as proven by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, to the extent that the Court determines that the *Scarpone* decision was a "new rule", the facts of this case fall within the first exception to the nonretroactivity principal.

VI. CONCLUSION

In the instant matter, a prisoner is being incarcerated, but without doubt not for the commission of the offense charged. As such, the Writ should be granted in order to remedy this aberrant and unjust situation.

Respectfully submitted,

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Date: 6/28/96

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE	:	
Petitioner	:	Civil Action No. 96-1231
v.	:	Judge Lancaster
GREGORY WHITE, et al	:	Magistrate
Respondents	:	Judge Caiazza

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Thomas W. Corbett, Jr., Attorney General of the Commonwealth of Pennsylvania, by Andrea F. McKenna, Senior Deputy Attorney General, respectfully requests that the Petition for Writ of Habeas Corpus be denied and, in support thereof, states:

1. A seriatim answer is dispensed with for the sake of clarity.

Procedural History

2. Between February 4 and February 18, 1996, Fiore and his co-defendant Dave Scarpone were tried before the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County and a jury. On February 18, 1986, Fiore was found guilty of the following: disposing of hazardous waste and operating a hazardous waste facility without a permit (two counts); 35 P.S. § 6018.401(a); discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of residual wastes and operating a residual waste facility contrary to his

permit, 35 P.S. § 6018.302(a) perjury; 18 Pa. C.S. § 4902; obstruction of administration of the law, 18 Pa. C.S. § 5101; and criminal conspiracy, 18 Pa. C.S. § 903.

3. On July 2, 1986, Fiore was found guilty in a non-jury trial of additional charges not involving Scarpone but arising from the same factual situation as the charges tried during the February 1986 trial. Fiore was found guilty of: discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, 35 P.S. § 6018.401 (a); disposing of residual wastes and operating a residual waste facility without permit (45 counts), 35 P.S. § 6018.302(a); using his property and the property of another as a solid waste disposal area without a permit (two counts), 35 P.S. § 6018.501(a); and disposing of residual wastes and operating a residual waste facility without a permit (four counts), 35 P.S. § 6018.301.

4. On April 10, 1987, sentence was imposed on the convictions from both trials, resulting in an aggregate sentence of six to twelve years in prison and a $200,000 fine. For his conviction of operating a hazardous waste facility without a permit in violation of the Solid Waste Management Act, 35 P.S. § 6018.401(a) (Count 1, tried February 1986), Fiore was sentenced to two and a half to five years in prison and ten years probation and fined $100,000. On Count 2, violating § 6018.40(a) (tried July 1986), Fiore was sentenced to two and a half to five years in prison, the sentence to run consecutively to the sentence imposed at Count 1. On his conviction of perjury (Count 5, tried in February 1986), Fiore was sentenced to one to two years imprisonment and five years probation.

5. Fiore timely filed a notice of appeal with the Pennsylvania Superior Court. The Superior Court *sua sponte* transferred Fiore's appeal to Commonwealth Court. By the provisions of the Judicial Code, 42 Pa.C.C. § 762(a)(2)(ii), Commonwealth Court had jurisdiction to review the judgment of sentenced imposed for the conviction of a crime defined by the Solid Waste Management Act. On Fiore's motion, his appeal was transferred back to Superior Court.

6. The issues raised by Fiore on direct appeal were as follows:[1] (1) Rule 1100 was violated by the Commonwealth; (2) sections 606(a) and (b) of the Solid Waste Management Act were unconstitutional in that both proscribed identical conduct but each provided for different penalties; in that sub-sections (a) and (b) created arbitrary classifications; that subsections (a) and (b) provided no guidance for prosecutors; and that subsections (a) and (b) constituted an unlawful delegation of authority to the prosecutors or agencies charged with enforcing them; (3) that certain provisions of the Solid Waste Management Act unconstitutionally delegate legislative authority to the Department of Environmental Resources (DER) and

[1] The list of issues at Paragraph 6 was derived from the opinion of Judge Novak of the Court of Common Pleas of Allegheny County denying Fiore's motion to modify sentence. Commonwealth v. Fiore, CC No. 8508740, slip op. (Allegheny County, January 19, 1988). This opinion is significant because the Pennsylvania Superior Court specifically stated that it affirmed Fiore's judgment of sentence "on the basis of the opinion of the court below." *Commonwealth v. Fiore*, No. 00485 Pittsburgh 1988, slip op. pp 3-4 (May 12, 1989) (memorandum) (Exhibit 5, Petitioner's Appendix)

the Environmental Quality Board (EQB) and that the regulatory scheme of the Solid Waste Management Act was unconstitutional in that the act does not state what regulations, if violated, would constitute a crime; that DER and EQB acted beyond the scope of their authority in including a particular condition for obtaining a permit; (4) that numerous charges were barred by the statute of limitations; (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; that the evidence was insufficient to support the conviction of perjury; that the evidence was insufficient to support the conviction of obstruction of the administration of law; (6) that Count 1 was not proven within the statute of limitations; that the evidence was insufficient to prove that Fiore operated a hazardous and/or residual waste disposal facility with a permit from DER; that, in regard to counts 6 through 49, Fiore possessed the necessary permit to allow him to dispose of solid wastes generated by Ohio Barge Lines; that Fiore had prior written approval to dispose residual wastes from Conoco Coal; that, in regard to counts 50 and 51, Fiore possessed the necessary permit for disposal of wastes from U.S. Steel-Edgar Thompson Works; that, in regard to counts 54 and 55, Fiore did not own the property in question and so was not required to have a permit to dispose of wastes there; that the Commonwealth failed to present sufficient evidence that Fiore actually discharged wastes; that Fiore's actions in the matter at issue constitute, at best, a *de minimus* infraction of the applicable statutes due to the Commonwealth's failure to prove

actual resultant pollution; (7) that the sentence imposed was illegal and excessive.

7. The Superior Court affirmed the judgment of sentence in an unpublished memorandum opinion which specifically stated its reliance on the opinion of the trial court. *Commonwealth v. Fiore*, No. 00485 Pittsburgh 1988, slip op. (May 12, 1989) (memorandum) (Commonwealth Exhibit B; Exhibit 5, Petitioner's Appendix), *affirmance noted at* 391 Pa. Super. 634, 563 A.2d 189 (1989).

8. Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim. The petition was denied in a per curiam order entered March 13, 1990 at No. 310 W.D. Allocatur Docket 1989.[2]

9. On August 5, 1991, more than two years after the Superior Court decided Fiore's direct appeal and more than a year after the Supreme Court denied Fiore allowance of appeal, thus making his appeal final, the Commonwealth Court of Pennsylvania decided the direct appeal of Fiore's co-defendant Dave Scarpone. Commonwealth Court determined that the state should have proceeded under a different provision of the Solid Waste Management Act and reversed the conviction of Scarpone with regard to the charge of causing and assisting in the operation of a hazardous waste disposal facility without a

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[2] Exhibit 8 of Petitioner's Appendix shows correspondence pertaining to the Supreme Court's denial of a petition for allowance of appeal of a Superior Court order at No. 494 Pittsburgh 1989, a case which is not the subject of the instant petition.

permit. Commonwealth Court affirmed Scarpone's conviction of obstructing the administration of law and other governmental function. (18 Pa.C.S. § 5101) *Scarpone v. Commonwealth*, 141 Pa. Commw. 560, 596 A.2d 892 (1991).

10. Scarpone filed in the Pennsylvania Supreme Court a petition for allowance of appeal of the decision affirming his conviction for obstructing the administration of law and other governmental function. The Commonwealth filed a cross-petition seeking review of the Commonwealth Court order vacating Scarpone's conviction for causing and assisting in the operation of hazardous waste disposal facility without a permit. Both Scarpone's petition and the Commonwealth's petition were granted.

11. On January 31, 1992, during the pendency of the *Scarpone* appeal before the Pennsylvania Supreme Court, Fiore filed an Application for Emergency Relief with the Pennsylvania Supreme Court at No. 9 W.D. Misc. Dkt. 1992. Fiore requested the Pennsylvania Supreme Court to take jurisdiction of the matter stated in the application pursuant to the Court's King's Bench powers, 42 Pa.C.S. § 726,[3] and to consolidate it with Scarpone's appeal. This

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[3] Section 726 provides as follows: "Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, *in any matter pending before any court or district justice of this Commonwealth* involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any state thereof and enter a final order or otherwise cause right and justice to be done." 42 Pa.C.S. § 726 (emphasis supplied). When Fiore filed his Application for Emergency Relief, requesting the Supreme Court to assume jurisdiction of his case, the matter of his Solid

application was denied without comment on March 25, 1992.

12. On December 15, 1993, the Supreme Court of Pennsylvania affirmed the judgment of Commonwealth Court in setting aside Scarpone's conviction for operating a hazardous waste disposal facility without a permit. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) (Commonwealth Exhibit M; Exhibit 2, Petitioner's Appendix).

13. On January 27, 1993, following the Pennsylvania Supreme Court opinion in *Scarpone*, Fiore filed a second Emergency Application for Extraordinary Relief with the Supreme Court of Pennsylvania at No. 7 W.D. Misc. Dkt. 1994. In this application Fiore asked the Pennsylvania Supreme Court to apply the *Scarpone* decision to him. The Commonwealth filed an answer in opposition, arguing that on direct appeal Fiore had appealed the sufficiency of the evidence against him, while Scarpone had argued a question of statutory construction; namely, that the Solid Waste Management Act had a specific provision providing for a violation of the conditions of a permit and that the Commonwealth should have charged under that specific provision. The Commonwealth argued that Fiore was not entitled to share in the relief of Scarpone who had presented a different intermediate appellate court with an issue different than the one raised by Fiore. (Commonwealth Exhibits E and F) Cognizant of its recent opinion

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Waste Management Act conviction was not pending before any state court or district justice.

in *Scarpone*, the Supreme Court denied Fiore's petition on March 25, 1992.

14. Fiore then filed a petition for post conviction relief in the Court of Common Pleas of Allegheny County. Fiore alleged that his sentence should be set aside "by reason of the Supreme Court having held [in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993)] that the facts charged in the indictment do not constitute a crime." (Commonwealth Exhibit I: Exhibit 12, Paragraph 15, Petitioner's Appendix) This petition was denied in an order entered August 18, 1994.

15. Fiore appealed the lower court's denial of post conviction relief to Commonwealth Court. On the Commonwealth's motion, Commonwealth Court transferred the appeal to Superior Court on September 24, 1994. In this appeal, docketed in the Superior Court at No. 1892 Pittsburgh 1994, Fiore raised the following questions for review: whether relief was available through a writ of coram nobis; whether the reversal of Scarpone's conviction, and not Fiore's, denied Fiore the equal protection of law; whether Fiore was denied due process of law by being charged for conduct which did not constitute a crime. (Commonwealth Exhibit ___)

16. Fiore next filed an Emergency Application for Extraordinary Relief in the Pennsylvania Supreme Court at No. 107 W.D. Misc. Dkt 1994. (Exhibit 16, Petitioner's Appendix) Fiore again urged the Supreme Court to invoke its King's Bench powers and take jurisdiction of his case. This application was denied.

17. The Superior Court thereafter affirmed the lower court's denial of post conviction relief in an order

entered September 20, 1995. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995) (Commonwealth's Exhibit K; Exhibit 6, Petitioner's Appendix). The Superior Court understood the essence of Fiore's appeal to be that he possessed a permit issued by the Department of Environmental Resources for his waste disposal facility and so had an absolute defense to charges of Solid Waste Management Act violations. Accordingly, the Superior Court found that Fiore had litigated the issue on direct appeal and was therefore ineligible to raise the issue again in a post-conviction proceeding. 445 Pa. Super. at 415, 665 A.2d at 1192-93.

18. Fiore then filed a petition for allowance of appeal in which he asked the Pennsylvania Supreme Court to review whether the Superior Court failed to consider the *Scarpone* decision as the law of the case and whether the Superior Court failed to consider whether there are circumstances which warrant a departure from the eligibility requirements set forth in the Post Conviction Relief Act, 42 Pa.C.S. § 9542.

19. On or about July 3, 1996, Fiore filed the instant petition for writ of habeas corpus in which he asserts that he is presently incarcerated for conduct which is not a crime and that he has been denied due process and equal protection of the law by the courts of Pennsylvania which have failed to apply *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993).

Requirement That Petitioner Be "In Custody"

20. A court may entertain an application for a writ of habeas corpus on behalf of a person "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a).

21. In *Garlotte v. Fordice*, ___ U.S. ___, 115 S.Ct. 1948, 132 L.Ed 2d 36 (1995), the Supreme Court held that a federal habeas petitioner was "in custody" for purposes of section 2254(a) under all of his sentences until all are served and that the petitioner may attack the conviction underlying the sentence scheduled to run first in the series.

22. In addition to the six to 12 year sentence imposed on April 10, 1987, for convictions of the Solid Waste Management Act and perjury, Fiore was additionally sentenced in Allegheny County Common Pleas Court on April 14, 1987, for convictions of bribery, 18 Pa.C.S. § 4701; obstructing administration of law, 18 Pa.C.S. § 1101 and conspiracy, 18 Pa.C.S. § 903. An eighteen month to three year sentence was imposed on one count of bribery; followed by a consecutive sentence of eighteen months to three years on one count of obstructing the administration of justice.

23. On June 21, 1989, Fiore was sentenced in the Court of Common Pleas of Westmoreland County to a term of five to ten years in prison on a conviction of conspiracy to commit murder. This sentence was amended on July 14, 1989, to plainly state that the sentence was consecutive to any sentence already being served.

24. By virtue of the above-stated reasons, Fiore is "in custody" for purposes of section 2254(a) of Title 28 of the United States Code.

Exhaustion of Remedies

25. A convicted state prisoner may not seek federal habeas relief unless he has exhausted the remedies available in the state courts. 28 U.S.C. § 2254(b); *Anderson v. Harless*, 459 U.S. 4 (1982); *Burkett v. Cunningham*, 826 F.2d 1208, 1213 (3d Cir. 1987).

26. The exhaustion requirement is satisfied when the state courts have had an opportunity to pass upon and correct alleged constitutional violations. A claim must be presented not only to the trial court but also to the state's intermediate court as well as to its supreme court. *Evans v. Court of Common Pleas, Del. Cty, Pa.*, 959 F.2d 1227, 1230 (3d Cir. Pa. 1992).

27. To demonstrate compliance with the exhaustion requirements, a habeas applicant must show that the federal claim asserted in the federal court has been fairly presented to the state courts. *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989), *citing Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982) *cert. denied* 459 U.S. 1115, 103 S.Ct. 750, 74 L.Ed 2d 968 (1983). It is not enough for the petitioner to show that he has presented the facts on which the federal claim is presented to the state court. Rather, the argument raised in the federal court must be the substantial equivalent of that presented to the state courts. Both the legal theory and the facts supporting a federal claim must have been submitted to the state court. *Id.*

28. The grounds for relief raised in the instant petition are that:

> [Fiore] is being held incarnated (*sic*) for conduct which the Supreme Curt (*sic*) has determined does not meet the elements of the crime charged; and
>
> He has been denied due process and equal protection by the Courts of Pennsylvania wherein they have failed to afford him application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993)

Petition for Writ, p. 3.

29. In his petition for post conviction relief in the state trial court, Fiore raised no constitutional claims but asserted only that his sentence should be set aside "by reason of the Supreme Court having held [in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993)] that the facts charged in the indictment do not constitute a crime." (Commonwealth Exhibit G; Exhibit 12, Paragraph 15, Petitioner's Appendix)

30. In appealing the trial court's denial of post conviction relief, Fiore framed his issues so as to argue that his failure to obtain the same appellate relief as his co-defendant deprived him of the due process of law and the equal protection of the laws and subjected him to cruel and unusual punishment. *Commonwealth v. Fiore*, No. 1892 Pittsburgh 1994 (Brief for Appellant, Issues II and III) (Commonwealth's Exhibit I).

31. The Superior Court, looking to the language of the PCRA petition, understood the essence of Fiore's

appeal to be that he possessed a permit issued by the Department of Environmental Resources for his waste disposal facility and so had an absolute defense to charges that he had violated Solid Waste Management Act by operating without a permit. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 409, 665 A.2d 1185, 1189 (1995). The Superior Court found that the allegation of error had been previously litigated. *Id.*, at 415, 665 A.2d 1192 (1995),[4] and declared Fiore ineligible for post conviction relief.

32. A fair reading of *Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995), is that Fiore challenged on direct appeal the sufficiency of the evidence of his conviction of Solid Waste Management Act violations throughout the Pennsylvania courts.

33. In considering whether a state court claim raised federal constitutional issues, the Third Circuit and its sister circuits have looked to the substance of the claim presented in the state courts, rather than its technical designation. *Evans v. Court of Common Pleas, Del. Cty., Pa.*,

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[4] The Superior Court cited to section 9543(a) of the Post Conviction Relief Act which establishes that eligibility for post conviction relief requires, among other things, proof by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a). The Court then noted that Section 9544 explains that "an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. . . . " 42 Pa.C.S. § 9544(a)(2). In Pennsylvania, there is no appeal as of right from any final order of the Superior Court. Pa. R.A.P. 341(d).

959 F.2d 1227 (3d Cir. Pa. 1992), *citing cases from Third, Second, First and Ninth circuits.*

34. In *Jackson v. Virginia*, 443 U.S. 307, 322, 99 S.Ct. 2781, 2791, 61 L.Ed. 2d 560 (1979), the Supreme Court held that a challenge to a state conviction brought on a claim of insufficient evidence necessarily implicates federal due process rights.

35. To the extent this petition could be construed as a claim that there was insufficient evidence to sustain the conviction of violations of the Solid Waste Management Act, the claim has been exhausted.

36. No Pennsylvania court, directly or by inference, has stated that Fiore ever raised an issue of the statutory construction of the Solid Waste Management Act.

37. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), the case of which Fiore seeks the benefit, is a case of statutory construction of the Solid Waste Management Act. In *Scarpone* the Pennsylvania Supreme Court decided that Scarpone would have been more appropriately charged under statutes providing penalty for violations of the conditions of a permit and "agreed with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection 634 A.2d at 1112.

38. To the extent that this petition can be construed as raising an issue of statutory construction of the Solid Waste Management Act, then the petition presents unexhausted claims.

39. To the extent that this petition can be construed as raising an issue of statutory construction of the Solid

Waste Management Act, the petition presents a nonconstitutional claim which is not cognizable under 28 U.S.C. § 2254(a), which allows the entertainment of an application of a state prisoner on the grounds that he is in custody "in violation of the Constitution or laws or treaties of the United States."

40. An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the Stats. [sic] 28 U.S.C. § 2254(b)(2), P.L. 104-133, effective April 25, 1996.

Discussion

The instant petition presents meritless claims and the writ should be denied.

I. BY STATE LAW FIORE WAS NOT ENTITLED TO APPLICATION OF *SCARPONE* AS HIS DIRECT APPEAL WAS COMPLETE AT THE TIME OF THE *SCARPONE* DECISION; FEDERAL DECISIONAL LAW REQUIRES NO DIFFERENT RESULT.

The fact that Fiore and Scarpone obtained different results in the state appellate courts does not require the conclusion that Fiore was deprived of the federal constitutional right of due process and equal protection of the law, or that he is incarcerated for conduct which does not constitute a crime. The different results obtained by Fiore and Scarpone are the products of different strategic decisions made by each and are not the result of the state impermissably denying equal protection or due process of law. Further, in affirming the reversal of Scarpone's

conviction, the Pennsylvania Supreme Court announced no new rule of constitutional significance; the *Scarpone* decision was one of statutory construction. The federal constitution does not compel a state to make retroactive a new construction of a state statute. *See Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 191, 38 L.Ed. 2d 179 (1973).

Both state and federal decisional law are in agreement that Fiore is not entitled to the benefit of *Scarpone* because Fiore's direct appeal was complete long before either the Commonwealth Court or the Supreme Court decisions in *Scarpone* were announced. Pennsylvania decisional law provides, "Even-handed decision making requires that similarly situated individuals *on direct appeal* be treated the same." *Commonwealth v. Brown*, 494 Pa. 380, 385, 431 A.2d 905, 907-08 (1981) (emphasis supplied). Under this general rule "a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occur before the judgment becomes final." *Id.*, at 385-87, 431 A.2d at 906-07. *Commonwealth v. Cabeza*, 503 Pa. 228, 469 A.2d 146, 148 (1983). *Commonwealth v. Metts*, ___ Pa. Super. ___, ___, 669 A.2d 346, 353 (1995) *allowance of appeal granted*, ___ Pa. ___, ___ A.2d ___ (1996).

Pennsylvania law on retroactive application tracks long-established federal decisional law. "Our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review. *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Linkletter v. Walter*, 381 U.S. 618, 627, 85 S.Ct. 1731, 17236, 14 L.Ed. 2d 601 (1965); *Bradley v. School Board of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed. 2d 476

(1974), *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed. 2d 590 (1974).

Having completed his case on direct appeal more than a year before Commonwealth Court reversed Scarpone's conviction, and more than three years before the Pennsylvania Supreme Court decided *Scarpone*, Fiore had absolutely no claim to the benefit of *Scarpone*.

Pennsylvania law is equally clear that Fiore is not entitled to the benefit of *Scarpone* on collateral review. The Pennsylvania Supreme Court has held that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final. *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180, 1183 (1986). In *Gillespie* the Pennsylvania Supreme Court specifically adopted the reasoning of the United States Supreme Court in *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed. 2d 38 (1985), where the court explained the rationale for applying full retroactivity to a pending and undecided direct review of a judgment of conviction and denying, or limiting, retroactivity, to a federal collateral attack upon a state conviction which has become final. 512 Pa. at 354, 516 A.2d at 1183. "[T]he distinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come." *Id.*, at 354, 516 A.2d at 1183, *quoting* 470 U.S. at 59-60, 105 S.Ct. 1065, 1170, 84 L.Ed. 2d 38, 47 (1985).

Similarly, on federal habeas review the general rule is that "[N]ew constitutional rules of criminal procedure

will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 109 S.Ct. 1060, 1075, 103 L.Ed. 2d 334 (1989). Only two exceptions apply: (1) If the new rule of criminal procedure places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; (2) if the new rule of criminal procedure is a "watershed rule of criminal procedure". *Id.* at 311, 109 S.Ct. at 1075-76.

Scarpone does not announce a new rule of criminal procedure; it does not place certain kinds of "primary, private individual conduct" beyond the power of the criminal law; it announces no "watershed rule of criminal procedure." *Scarpone* is the construction of a state criminal statute by a state supreme court. The holding of *Scarpone* is, "[T]he statutory language here [a subsection of the Solid Waste Management Act] cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection." 535 Pa. 279, 634 A.2d 1112.

Chief Justice Rehnquist, writing in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 2d 353 (1993), identified two interests in addition to the state's interest in finality of convictions which call for different standards for retroactivity on federal habeas review: comity and federalism. "The States possess primary authority for defining and enforcing the criminal law." *Id.* at ___, 113 S.Ct. 1710, 1720. It is these later principles which most compellingly support the conclusion that Fiore is not entitled to a writ of habeas corpus.

The United States Supreme Court has made plain that a state is not constitutionally compelled to make retroactive new construction of state statutes.[5] In *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed. 2d 179 (1973). The Supreme Court reversed the grant of habeas relief to petitioners who had sought to have their convictions reversed by retroactive application of a Florida Supreme Court decision declaring the statute under which they had been convicted void for vagueness. The U.S. Supreme Court held that the law was not void at the time of the convictions, and found no constitutionally compelled reason for Florida to vacate previously obtained convictions in the wake of a new construction of state law. While there are differences between the facts of the instant petition and those of *Wainwright v. Stone*, the factual differences do not negate the application of the underlying principle of *Wainwright v. Stone*: that Pennsylvania had no obligation to apply the statutory construction of the Solid Waste Management Act as obtained in *Scarpone* to Fiore who had never raised an issue of statutory construction of the Solid Waste Management Act and whose conviction had long been final when *Scarpone* was decided.

In denying Fiore post-conviction relief, the Pennsylvania Superior Court said:

[5] Petitioner cites various cases concerning retroactive application of *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), 97 L.Ed. 2d 292 (1987), a case narrowing the scope of the federal mail fraud statute. In these federal cases concerning the construction of a federal statute, the principles of federalism and comity need not be considered.

> In reaching this result, we have not overlooked the uniqueness of appellant's situation. Appellant was convicted of operating a waste management facility without a permit, and his conviction was affirmed. His general manager, David (*sic*) Scarpone, was convicted of the same offense, and his conviction was reversed because, the appellate courts concluded, he had a permit. The permit in question was the same, however; it was appellant's as well as Scarpone's. Unsurprisingly, appellant views the situation as unjust.
>
> Nevertheless, the crucial fact is that appellant's direct appeal was no longer pending when the Supreme Court made the ruling which appellant now seeks to have applied to this case.

Commonwealth v. Fiore, 445 Pa. Super. 401, 416, 665 A.2d 1185, ___ (1995).

Fiore was not entitled as the benefit of *Scarpone* when the decision was handed down, he is not entitled to the benefit of *Scarpone* now. "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed. 2d 1090 (1983).

WHEREFORE, respondents respectfully request that the petition for writ of habeas corpus be denied without a hearing and that no certificate of probable cause issue.

Respectfully submitted,

Thomas W. Corbett, Jr.
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By: /s/ Andrea F. McKenna
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List of Commonwealth Exhibits

A. Petitioner's brief on direct appeal filed in Pennsylvania Superior Court

B. Superior Court opinion affirming judgment of sentence.

C. Opinion of the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County denying post verdict motions, used as basis of Superior Court's affirmance of judgment of sentence.

D. Petitioner's Application to the Pennsylvania Supreme Court Seeking Emergency Relief (N. 9 W.D. Misc. Dkt. 1992)

E. Petitioner's Second Application to the Pennsylvania Supreme Court Seeking Emergency Relief (No. 7 W.D. Misc. Dkt. 1994)

F. Commonwealth's Answer In Opposition to Emergency Application for Extraordinary Relief and Appendix

G. Petitioner's Motion for Post Conviction Relief

H. Lower court order denying post conviction relief

I. Petitioner's Brief in Superior Court on appeal of denial of post conviction relief (No. 1892 Pittsburgh 1994)

J. Petitioner's Reply Brief in Superior Court

K. Superior Court opinion denying post conviction relief, 665 A.2d 1185

L. Commonwealth Court opinion reversing conviction of Dave Scarpone for Solid Waste Management Act violations, 596 A.2d 892 (1990)

M. Pennsylvania Supreme Court opinion affirming reversal of Scarpone's conviction for Solid Waste Management Act violations. 634 A.2d 1109

N. Table of Contents, Issues Presented and Summary of Argument, Brief filed in Commonwealth Court on direct appeal of Dave Scarpone.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner	:	Civil Action No. 96-1231
v.	:	Judge Lancaster Magistrate Judge Caiazza
GREGORY WHITE, et al. Respondents	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing Response To Petition For Writ Of Habeas Corpus upon the person(s) and in the manner indicated below.

Service by first class mail
addressed as follows:

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Dated: August 2, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, vs. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	)	Case No. 961231

PETITIONER'S REPLY TO RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

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PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES Petitioner, William Fiore, by and through his undersigned counsel and files the within Reply to Response to Petition for Writ of Habeas Corpus.

1. In his Habeas Corpus petition, Petitioner raised a due process/sufficiency of the evidence claim and an equal protection claim.

2. Respondents have conceded that Plaintiff has exhausted the due process/sufficiency of the evidence claim. Thus, that claim is ripe for review.

3. To the extent that Petitioner has not exhausted his equal protection claim, Petitioner is amenable to dropping that claim so as to achieve a timely resolution of this petition.

DISCUSSION

The primary issue to be decided in resolving this Habeas Corpus petition is whether Petitioner William Fiore may benefit from the retroactive application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*.

Under §§ 2254 and 2255, the Supreme Court has created separate retroactivity standards for new rules of

criminal procedure and new decisions of substantive criminal law.[1]

In Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298 (1974), the Court articulated the appropriate standard for evaluating the retroactivity of new substantive criminal decisions. There the defendant's conviction, although already affirmed by the Ninth Circuit, was called into question by a new Ninth circuit decision, decided on nearly identical facts. Addressing the retroactivity of the new decision, the Supreme Court held that:

> The appropriate inquiry [is] whether the claimed error of law was a "fundamental defect which inherently results in a complete miscarriage of justice" and whether "it presents exceptional circumstances where the need for the remedy afforded" by collateral relief is apparent.

Id. at 346, 94 S.Ct. at 2305 (*quoting Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962)). The Court held that the situation presented by Davis – in which the defendant may have been convicted for acts which were

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[1] The Court first established this analytic distinction in *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876 (1973). There the Court held retroactive its decision in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184 (1970), which prohibited prosecution of a defendant by both the municipality and the state for the same crime on double jeopardy grounds. The Court declined to analyze Waller's retroactivity under the extant procedural retroactivity standard, that of *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), explaining that "Guarantees that do not relate to . . . procedural rules cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis." *Robinson*, 409 U.S. at 508, 93 S.Ct. at 878.

not considered criminal under the relevant statute – satisfied this standard. It concluded that the injustice that would occur but for the retroactive application of the new Ninth Circuit decision was sufficiently egregious to warrant retroactivity.

Respondents rely on the case *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190 (1973), for the proposition that a state is not constitutionally compelled to retroactively apply new construction of state statutes. In *Wainwright v. Stone*, the Habeas Corpus petitioners sought benefit of a retroactive application of a Florida Supreme Court decision which made the statute under which they had been convicted void for vagueness and uncertainty. In reversing the lower court's grant of Habeas relief to these petitioners, the Supreme Court specifically determined that the petitioners knew, at the time of their actions, that their conduct was criminally proscribed based on prior cases decided under that statute.

Further the Supreme Court specifically determined that the situation in *Wainwright v. Stone* involved no violation of the "underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 22, 94 S.Ct. at 192 (citing *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954)).

The facts in *Wainwright v. Stone* are sufficiently distinct from the facts in the case at hand so that its holding is not compelling here. Rather, the Court's care in distinguishing the facts in that case from a situation where an individual is held criminally responsible for conduct

which he could not reasonably understand to be proscribed, is key. In Fiore's situation, there was no previous case law interpreting the statute under which he was convicted which held that his conduct was criminally proscribed. Thus, he was never under any notice that such action was proscribed under that section of the Act.

A ruling that a trial court lacked power to convict a defendant for proven activity must necessarily be retroactive. The Supreme Court stated in *United States v. United States Coin & Currency*, 401 U.S. 715, 724, 91 S.Ct. 1041, 1046 (1971), that "Even the use of impeccable factfinding procedures could not legitimate a verdict" where "we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity."

While Petitioner acknowledges that the burden is upon him to prove that the proceedings in state court were incorrect, the Court of Appeals for the Third Circuit has repeatedly noted that relief will be granted when circumstances compel such action "to achieve justice". See *United States v. Cariola*, 323 F.2d 180, 184 (3rd Cir. 1963). That Court has further acknowledged that "an assertion that a conviction was based on conduct and not covered by a criminal statute is of a 'fundamental character' ". *United States v. Osser*, 864 F.2d 1056, 1059 (3rd Cir. 1988) (citing *Davis v. United States, supra.*)

The issue presented in the case *sub judice* is not fundamentally one of retroactivity. The Pennsylvania Supreme Court in *Scarpone* clearly held *Fiore's conduct* not

covered by the statute prohibiting operating a waste facility without a permit *because Fiore had a permit*. The Superior Court's affirmance of Fiore's conviction was specifically overruled in *Scarpone*. The Supreme Court held "The two courts (Superior and Commonwealth) are clearly in conflict and this leaves the Attorney General's Office ill-advised on how it should proceed in such situations."

If the Attorney General is ill-advised, then it is difficult to rationalize Fiore serving ten years in prison for not committing the crime which the Attorney General was ill-advised in charging. Simple justice requires that the writ be granted.

CONCLUSION

Accordingly, Petitioner respectfully requests a prompt resolution of this petition, and a grant of all relief requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply To Response To Petition For Writ Of Habeas Corpus was served this 21st day of August, 1996, upon the following by first class mail, postage prepaid.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3288

WILLIAM FIORE

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Appellants

BRIEF FOR APPELLANTS

Appeal from the Order entered April 25, 1997, by the Honorable Gary L. Lancaster of the United States District Court, Western District of Pennsylvania, at D.C. No. 96-CV-01231, granting Petition for Writ of Habeas Corpus

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STATEMENT OF SUBJECT MATTER JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C.A. § 2254 (West Supp. 1997).

STATEMENT OF APPELLATE JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C.A. §§ 1291 (West 1993) and 2253 (West 1994).

STATEMENT OF ISSUES

Is the relief granted by the District Court in contravention of *Wainwright v. Stone*, 444 U.S. 21 (1973) which holds that a state is not constitutionally compelled to make retroactive new construction of state statutes?

Did the District Court, in applying *United States v. Woods*, 986 F.2d 669 (3d Cir. 1993), to the instant case, ignore the different standards of retroactivity applicable to direct and collateral review as enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1992)?

Did the relief granted by the District Court deviate from the proper role of federal habeas proceedings as enunciated in *Barefoot v. Estelle*, 463 U.S. 880 (1983)?

If this Court affirms the opinion of the District Court granting the writ of habeas corpus, should the case be remanded to the state trial court for re-sentencing in accordance with *Commonwealth v. Goldhammer*, 512 Pa. 587, 517 A.2d 1280 (1986)?

STATEMENT OF CASE

This is an appeal from an order of the United States District Court, Western District of Pennsylvania, granting a petition for a writ of habeas corpus to a prisoner serving a state sentence.

Between February 4 and February 18, 1986, William Fiore (hereinafter "Fiore") and his co-defendant Dave Scarpone were tried before the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County, Pennsylvania and a jury. On February 18, 1986, Fiore was found guilty of the following charges: disposing of hazardous waste and operating a hazardous waste facility without a permit (two counts); 35 P.S. § 6018.401(a); discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of residual wastes and operating a residual waste facility contrary to his permit, 35 P.S. § 6018.302(a); perjury, 18 Pa.C.S. § 4902; obstruction of administration of the law, 18 Pa.C.S. § 5101; and criminal conspiracy, 18 Pa.C.S. § 903.

On July 2, 1986, Fiore was found guilty in a non-jury trial of additional charges not involving Scarpone but

arising from the same factual situation as the charges tried during the February 1986 trial. Fiore was found guilty of: discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, 35 P.S. § 6018.401 (a); disposing of residual wastes and operating a residual waste facility without permit (45 counts), 35 P.S. § 6018.302(a); using his property and the property of another as a solid waste disposal area without a permit (two counts), 35 P.S. § 6018.501(a); and disposing of residual wastes and operating a residual waste facility without a permit (four counts), 35 P.S. § 6018.301.

On April 10, 1987, Fiore was sentenced on the convictions from both trials, resulting in an aggregate sentence of six to twelve years in prison and a $200,000 fine. For his conviction of operating a hazardous waste facility without a permit in violation of the Solid Waste Management Act, 35 P.S. § 6018.401(a) (Count 1, tried February 1986), Fiore was sentenced to two and a half to five years in prison and ten years probation and fined $100,000. On Count 2, violating § 6018.40(a) (tried July 1986), Fiore was sentenced to two and a half to five years in prison, the sentence to run consecutively to the sentence imposed at Count 1. On his conviction of perjury (Count 5, tried in February 1986), Fiore was sentenced to one to two years imprisonment and five years probation.[1]

[1] In addition to the six to 12 year sentence imposed on April 10, 1987, for convictions of the Solid Waste Management Act and perjury, Fiore was additionally sentenced in Allegheny County Common Pleas Court on April 14, 1987, for convictions of bribery, 18 Pa.C.S. § 4701; obstructing administration of law, 18 Pa.C.S. § 1101 and conspiracy, 18 Pa.C.S. § 903. An eighteen month to three year sentence was imposed on one count of bribery; followed by a consecutive sentence of eighteen months to three years on one count of obstructing the administration of justice.

On June 21, 1989, Fiore was sentenced in the Court of Common Pleas of Westmoreland County to a term of five to ten years in prison on a conviction of conspiracy to commit murder. This sentence was amended on July 14, 1989, to plainly state that the sentence was consecutive to any sentence already being served.

Fiore timely filed a notice of appeal with the Pennsylvania Superior Court. The Superior Court *sua sponte* transferred Fiore's appeal to Commonwealth Court. By the provisions of the Pennsylvania Judicial Code, 42 Pa.C.S. § 762(a)(2)(ii), Commonwealth Court had jurisdiction to review the judgment of sentenced imposed for the conviction of a crime defined by the Solid Waste Management Act. On Fiore's motion, his appeal was transferred back to Superior Court.

The issues raised by Fiore on direct appeal were as follows:[2] (1) Rule 1100 was violated by the Commonwealth; (2) sections 606(a) and (b) of the Solid Waste

[2] This list of issues was derived from the opinion of Judge Novak of the Court of Common Pleas of Allegheny County denying Fiore's motion to modify sentence. Commonwealth v. Fiore, CC No. 8508740, slip op. (Allegheny County, January 19, 1988), Appendix, p. 1a. This opinion is significant because the Pennsylvania Superior Court specifically stated that it affirmed Fiore's judgment of sentence "on the basis of the opinion of the court below." Commonwealth v. Fiore, No. 00485 Pittsburgh 1988, slip op. pp. 3-4 (May 12, 1989) (memorandum), Appendix, p. 124a.

Management Act were unconstitutional in that both proscribed identical conduct but each provided for different penalties; in that sub-sections (a) and (b) created arbitrary classifications; that subsections (a) and (b) provided no guidance for prosecutors; and that subsections (a) and (b) constituted an unlawful delegation of authority to the prosecutors or agencies charged with enforcing them; (3) that certain provisions of the Solid Waste Management Act unconstitutionally delegate legislative authority to the Department of Environmental Resources (DER) and the Environmental Quality Board (EQB) and that the regulatory scheme of the Solid Waste Management Act was unconstitutional in that the act does not state what regulations, if violated, would constitute a crime; that DER and EQB acted beyond the scope of their authority in including a particular condition for obtaining a permit; (4) that numerous charges were barred by the statute of limitations; (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; that the evidence was insufficient to support the conviction of perjury; that the evidence was insufficient to support the conviction of obstruction of the administration of law; (6) that Count 1 was not proven within the statute of limitations; that the evidence was insufficient to prove that Fiore operated a hazardous and/or residual waste disposal facility with a permit from DER; that, in regard to counts 6 through 49, Fiore possessed the necessary permit to allow him to dispose of solid wastes generated by Ohio Barge Lines; that Fiore had prior written approval to dispose residual wastes

from Conoco Coal; that, in regard to counts 50 and 51, Fiore possessed the necessary permit for disposal of wastes from U.S. Steel-Edgar Thompson Works; that, in regard to counts 54 and 55, Fiore did not own the property in question and so was not required to have a permit to dispose of wastes there; that the Commonwealth failed to present sufficient evidence that Fiore actually discharged wastes; that Fiore's actions in the matter at issue constitute, at best, a *de minimus* infraction of the applicable statutes due to the Commonwealth's failure to prove actual resultant pollution; (7) that the sentence imposed was illegal and excessive.

The Superior Court affirmed the judgment of sentence in an unpublished memorandum opinion which specifically stated its reliance on the opinion of the trial court. *Commonwealth v. Fiore,* No. 00485 Pittsburgh 1988, slip op. (May 12, 1989) (memorandum) *affirmance noted at* 391 Pa. Super. 634, 563 A.2d 189 (1989). Appendix, p. 124a.

Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim. The petition was denied in a per curiam order entered March 13, 1990 at No. 310 W.D. Allocatur Docket 1989.

On August 5, 1991, more than two years after the Superior Court decided Fiore's direct appeal and more than a year after the Supreme Court denied Fiore allowance of appeal, thus making his appeal final, the Commonwealth Court of Pennsylvania decided the direct

appeal of Fiore's co-defendant Dave Scarpone. Commonwealth Court determined that the state should have proceeded under a different provision of the Solid Waste Management Act and reversed the conviction of Scarpone with regard to the charge of causing and assisting in the operation of a hazardous waste disposal facility without a permit. Commonwealth Court affirmed Scarpone's conviction of obstructing the administration of law and other governmental function. (18 Pa.C.S. § 5101) *Scarpone v. Commonwealth*, 141 Pa. Commw. 560, 596 A.2d 892 (1991). Appendix, p. 130a.

Scarpone filed in the Pennsylvania Supreme Court a petition for allowance of appeal, seeking discretionary review, of the decision affirming his conviction for obstructing the administration of law and other governmental function. The Commonwealth filed a cross-petition seeking review of the Commonwealth Court order vacating Scarpone's conviction for causing and assisting in the operation of hazardous waste disposal facility without a permit. Both Scarpone's petition and the Commonwealth's petition were granted.

On January 31, 1992, while the *Scarpone* appeal was pending before the Pennsylvania Supreme Court, Fiore filed an Application for Emergency Relief with the Pennsylvania Supreme Court at No. 9 W.D. Misc. Dkt. 1992. Fiore requested the Pennsylvania Supreme Court to take jurisdiction of the matter stated in the application pursuant to the Court's King's Bench powers, 42 Pa.C.S.

§ 726,[3] and to consolidate it with Scarpone's appeal. This application was denied without comment on March 25, 1992.

On December 15, 1993, the Supreme Court of Pennsylvania affirmed the judgment of Commonwealth Court which had set aside Scarpone's conviction for operating a hazardous waste disposal facility without a permit. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) Appendix, p. 135a.

On January 27, 1993, following the Pennsylvania Supreme Court opinion in *Scarpone*, Fiore filed a second Emergency Application for Extraordinary Relief with the Supreme Court of Pennsylvania at No.7 W.D. Misc. Dkt. 1994. In this application Fiore asked the Pennsylvania Supreme Court to apply the *Scarpone* decision to him. The Commonwealth filed an answer in opposition, arguing that on direct appeal Fiore had appealed the sufficiency of the evidence against him, while Scarpone had argued a question of statutory construction; namely, that the Solid

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[3] Section 726 of Title 42 provides as follows: "Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, *in any matter pending before any court or district justice of this Commonwealth* involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done." 42 Pa.C.S. § 726 (emphasis supplied). When Fiore filed his Application for Emergency Relief, requesting the Supreme Court to assume jurisdiction of his case, the matter of his Solid Waste Management Act conviction was not pending before any state court or district justice. Accordingly, the Pennsylvania Supreme Court was unable to assume jurisdiction.

Waste Management Act had a specific provision providing for a violation of the conditions of a permit and that the Commonwealth should have charged under that specific provision. The Commonwealth argued that Fiore was not entitled to share in the relief of Scarpone who had presented a different, intermediate appellate court with an issue different than the one raised by Fiore. Cognizant of its recent opinion in *Scarpone*, the Supreme Court denied Fiore's petition on March 25, 1992.

Fiore then filed a petition for post conviction relief in the Court of Common Pleas of Allegheny County. Fiore alleged that his sentence should be set aside "by reason of the Supreme Court having held [in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993)] that the facts charged in the indictment do not constitute a crime." This petition was denied in an order entered August 18, 1994.

Fiore appealed the lower court's denial of post conviction relief to Commonwealth Court. On the Commonwealth's motion, Commonwealth Court transferred the appeal to Superior Court on September 24, 1994. In this appeal, docketed in the Superior Court at No. 1892 Pittsburgh 1994, Fiore raised the following questions for review: whether relief was available through a writ of coram nobis; whether the reversal of Scarpone's conviction, and not Fiore's, denied Fiore the equal protection of law; whether Fiore was denied due process of law by being charged for conduct which did not constitute a crime.

Fiore next filed an Emergency Application for Extraordinary Relief in the Pennsylvania Supreme Court at No. 107 W.D. Misc. Dkt. 1994. Fiore again urged the

Supreme Court to invoke its King's Bench powers and take jurisdiction of his case. This application was denied.

The Superior Court thereafter affirmed the lower court's denial of post conviction relief in an order entered September 20, 1995. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995) The Superior Court understood the essence of Fiore's appeal to be that he possessed a permit issued by the Department of Environmental Resources for his waste disposal facility and so had an absolute defense to charges of Solid Waste Management Act violations. Accordingly, the Superior Court found that Fiore had litigated the issue on direct appeal and was therefore ineligible to raise the issue again in a post-conviction proceeding. 445 Pa. Super. at 415, 665 A.2d at 1192-93. Appendix, p. 139a.

Fiore then filed a petition for allowance of appeal in which he asked the Pennsylvania Supreme Court to review whether the Superior Court failed to consider the *Scarpone* decision as the law of the case and whether the Superior Court failed to consider whether there are circumstances which warrant a departure from the eligibility requirements set forth in the Post Conviction Relief Act, 42 Pa.C.S. § 9542. The Supreme Court rejected the petition.

On or about July 3, 1996, Fiore filed a petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania, Appendix p. 148a, in which he asserted that he is presently incarcerated for conduct which is not a crime and that he had been denied due process and equal protection of the law by the courts of Pennsylvania which had failed to apply

Commonwealth v. Scarpone, 535 Pa. 273, 634 A.2d 1109 (1993) to his case. Respondents filed a response requesting that the petition for writ of habeas corpus be denied without a hearing.

In a report issued February 27, 1997, United States Magistrate Francis X. Caiazza recommended that the writ of habeas corpus be granted. On March 14, 1997, Respondents timely filed objections to the magistrate's report and recommendation.

On April 21, 1997, the Honorable Gary L. Lancaster, United States District Court Judge, adopted the Magistrate's Report and Recommendation and ordered that the petition for writ of habeas corpus be granted. The court further ordered respondents to release Fiore from the portion of his incarceration which pertains to the consecutive sentences imposed for the jury and non-jury trial convictions under 35 P.S. § 6018.401(a) and § 6018.606(f). This Order was entered April 25, 1997.

Respondents filed in the United States District Court for the Western District of Pennsylvania an application for a stay of the Order pending appeal. Respondents then timely filed this appeal.

STATEMENT OF FACTS

[4]The defendant was the owner and operator of a very successful business known as the Municipal and Industrial Disposal Company (MIDC) which is located in Elizabeth Township, Allegheny County. In 1979, he received a permit to dispose of various wastes including hazardous wastes.

In order to properly understand the issues in the case, we believe that a review of the regulation process would be helpful. For each type of waste or "waste stream" which the defendant intended to receive at his site, he was required to submit a "module" to the Department of Environmental Resources (DER) for approval. Known as "Module 1," this form indicates the type of waste, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed. The information is certified by an engineer employed by the landfill operator. The DER then reviews the proposal to determine whether the particular waste stream is compatible with: (1) other waste deposited on that site, and (2) the site liner.

Additionally, the DER considers whether any leachate generated by a particular waste stream is compatible

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[4] The statement of the facts is excerpted from Commonwealth v. Fiore, CC No. 8508740, (Allegheny County, January 19, 1988), Appendix, p. 1a. No published opinion in the *Fiore* case sets out the factual basis of his conviction for operating a hazardous waste disposal facility without a permit, 35 P.S. §§ 6018.606(f) and 6018.401. For ease in reading the convention of underling and single-spacing lengthy quotations will be foregone.

with the end treatment facility. Leachate is another term of art meaning the contaminent generated from either rain, surface or groundwater moving through already deposited waste.

Upon receipt of a module, the DER's technical staff reviews it. In certain instances, the module may be submitted to outside agencies for their review as well. Based upon this analysis, the DER will then either approve or reject the module. If rejected, the landfill operator may not deposit this particular waste at his facility.

Often, the modules do not contain sufficient date to be properly reviewed. They are then returned to the landfill operator for amendment. Modules are often submitted, returned, re-submitted, returned again, re-submitted yet again before they are ready to be reviewed by the DER staff for final disposition. Once accepted for final review by the DER, the review process could take anywhere from a few weeks to several months. With this background, we now turn to the specific facts in this case.

The defendant's disposal facility contained, *inter alia*, a Phase I disposal pit, a temporary disposal pit, and a demolition site. The defendant was licensed to receive certain streams of hazardous waste and deposit them in the temporary pit and later the Phase I pit. The pit was lined with natural clay which had been found to be sufficient to contain the wastes and keep them from seeping into the acquifer. After the pit was full, it was eventually to be closed and covered in order to return the site to its natural condition. In order to be sure that the hazardous wastes were not seeping into the environment, various monitoring systems were established.

Running under the Phase I pit was an under-drain which was identified as pipe 810. This under-drain converges with the 711 pipe in a manhole near the pit and emits a single discharge. The purpose of the under-drain, according to Dan Peterson, an operation supervisor in the DER, Pittsburgh Region of the Bureau of Solid Waste Management, was to "convey mine water beneath the disposal pit carrying it away from the liner. In addition, it was designed in the permit as a monitoring point . . . to check on the integrity of the liner. If the liner would fail, materials seeping out of the pit through the liner would appear in the under-drain. (N.T. 2/4/86, pp. 79-83)

In late 1982 and early to mid 1983, Mr. Peterson, during routine inspection visits, detected "a strong organic odor coming from the manhole." He described this odor as "very similar to the type of odor that one gets when one is around a disposal pit. Also, it's similar to odors you get at U.S. Steel coke-making facility." (N.T. 2/4/86, p. 96-97) Numerous samples of the discharge from the 711 and 810 pipes were collected by the DER and tested at their laboratory in Harrisburg. The samples tested positive for the presence of organic chemicals (*i.e.*, Benzene, Toluene and Xylene). (N.T. 2/4/86, pp. 202-205, 381-382, 528-530; Commonwealth Exhibits 15-22)

The DER officials informed the defendant that no additional requests to dispose of hazardous wastes would be approved "until this matter is resolved." (N.T. 2/4/86, p. 102) Subsequently, several meetings were held between the defendant and DER officials. As a result of these discussions, the defendant and the Commonwealth entered into a "Consent Order and Agreement." (Commonwealth Exhibit No. 13) The agreement provided that

Fiore would apply for a water quality permit (NPDES) which would set certain limits on the chemicals discharged from the site. If the discharge exceeded those limits, the defendant agreed either to establish a treatment plant on the site or collect the discharge and transport it to a treatment plant. (N.T. 2/4/86, pp. 103-104)

Subsequently, in November of 1983, James R. Shack, a solid waste specialist for the DER, who took samples from both the 810 pipe and the 711 pipe, noticed that the discharge flow from the 810 pipe had lessened significantly and the odors no longer existed. (N.T. 2/4/86, p. 207) On July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. As he was curious about this phenomenon, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates. (N.T. 2/4/86, pp. 209-211)

Charles Kroll, a welder, testified that he was contacted and hired during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to an as yet unused disposal pit. (N.T. 2/4/86, pp. 244-247) Mr. Kroll indicated that the defendant observed this pipe installation. In fact, he stated that the defendant instructed him to hide the smaller pipe with a "good size rock." (N.T. 2/4/86, pp. 245-246) Another welder, Elmer Holmes, testified that during the same time period, he was personally contacted and hired by the defendant to install a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the ground. Inside this stand

pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type wrench, could be turned on and off. (N.T. 2/4/86, pp. 305-311)

The capping of the 810 pipe prevented the flow of water from under the Phase I pit into the 810-711 monitoring point. This was the discharge which previously had given off organic odors leading to the finding that hazardous wastes were seeping into the aquifer running under the pit. The newly installed connecting pipe brought water from an as yet unopened disposal pit to a point in front of the cap. Had this alteration not been made, the capping of the 810 pipe would have prevented any flow at all at the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and on into an unnamed tributary of the Youghiogheny River. Tracy Opfar and John Opfar, employees of the defendant, testified that the co-defendant, Scarpone, and others, would open this valve at night and on weekends when the DER officials were not likely to appear to check the monitoring point.

Although the defendant was not charged with polluting the waterways, the Commonwealth's evidence established that when the valve was turned on, a discharge flowed from the outfall pipe into the tributary. Samples of this discharge were collected in small stainless steel buckets. (N.T. 2/4/86, pp. 424-433) These samples were transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists, David Clemens and Homer Moore. The samples, marked Commonwealth's

Exhibits 44-A, 44-B, 45-A, and 45-B, all contained hazardous wastes. (N.T. 2/4/86, pp. 499-502, 529-530)

STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellants are unaware of the existence of any related case or proceeding in the federal courts.

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

Review of a district court's decision to grant a writ of habeas corpus is plenary when the district court did not hold an evidentiary hearing and engage in independent fact-finding. *McAleese v. Mazurkiewicz*, 1 F.3d 159 (3d Cir. 1993); *Kontakis v. Beyer*, 19 F.3d 110 (3d Cir. 1994).

SUMMARY OF ARGUMENT

Federal courts are not forums in which to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 3392, 77 L.Ed. 2d 1090 (1983). The District Court order, if allowed to stand, will cause the federal writ to issue for the purpose of over-riding the Pennsylvania courts' appropriate exercise of discretion and Pennsylvania's determination of when new cases will be retroactively applied. See *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986) (a new rule of law to which we give full retroactive effect will not be applied to any case on collateral review unless decision was handed down during pendency of appellant's direct appeal and issue was properly preserved there). That Fiore did not obtain post

conviction relief is a result of a state court applying state statutory law to find that an issue litigated on direct appeal cannot be litigated again in a post conviction proceeding and in acknowledging that state law on retroactivity also made Fiore ineligible to receive the benefit of the *Scarpone* decision. These circumstances do not rise to the deprivation of Fiore's constitutional rights. The instant petition does not present constitutional violations requiring the corrective action of the federal courts.

ARGUMENT

I. FIORE SUFFERED NO FEDERAL CONSTITUTIONAL VIOLATIONS BY PENNSYLVANIA'S DENIAL OF THE RETROACTIVE APPLICATION OF THE STATE SUPREME COURT DECISION IN *COMMONWEALTH v. SCARPONE;* FIORE IS ENTITLED TO NO FEDERAL HABEAS RELIEF.

Co-defendants William Fiore and Dave Scarpone were tried and convicted of operating a hazardous waste disposal plant without a permit, 35 P.S. § 6018.401(a). The judgment of sentence against Fiore was affirmed. In a separate appeal, the conviction of his co-defendant was overturned. Fiore obtained a result different from Scarpone because Fiore chose to raise different issues than Scarpone. Having chosen, with the assistance of counsel, a particular strategy, Fiore is entitled to the results of that strategy, and to no more. Fiore is not entitled to benefit from the decision reached in his co-defendant's appeal concerning an issue which Fiore had never raised and which was determined long after the completion of his own direct appeal. The Commonwealth of Pennsylvania

is entitled to the finality of Fiore's conviction as determined by the state appellate courts. The fact that co-defendants chose different strategies on appeal and obtained different results calls for no remedial action by the federal courts. The United States District Court for the Western District of Pennsylvania erred in granting Fiore's petition for a writ of habeas corpus. This Court should vacate the order entered by the District Court.

A. The State Court's Denial of Fiore's Federal Constitutional Claims Rests On An Independent and Adequate State Ground.

The Magistrate's Report, adopted by the District Court, concluded that Fiore had exhausted available state remedies and thus satisfied the threshold exhaustion requirement by repeatedly presenting the issues raised in his petition for a writ of habeas corpus "to the [Pennsylvania] Supreme Court either through a direct appeal, a PCRA petition or an Emergency Petition for Extraordinary Relief." Magistrate's report, p. 14. Respondents filed objections to this finding.

Fiore raised the following issues in his petition for a writ of habeas corpus:

> [Fiore] is being incarnated (*sic*) for conduct which the Supreme Curt (*sic*) has determined does not meet the elements of the crime charged; and
>
> He has been denied due process and equal protection by the Courts of Pennsylvania wherein they have failed to afford him application of the

> Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993)

Appendix, p. 151a.

A federal district court will not entertain a state prisoner's application for a writ of habeas corpus unless the petitioner has first exhausted the remedies available to him in the state courts. 28 U.S.C. § 2254(b), (c). The exhaustion requirement is satisfied when the petitioner has afforded the state's highest court a fair opportunity to address the claim. *Anderson v. Harless*, 459 U.S. 4 (1982). "Fair presentation" requires "a state prisoner . . . present the state courts with the same claim he urges upon the federal courts." *Picard v. Connor*, 404 U.S. 275, 276 (1971). "The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." *Id.* at 276.

The Magistrate's finding of exhaustion through fair presentation is erroneous in several regards.

First, by authority of *Castille v. Peoples*, 489 U.S. 346 (1989), issues raised in Emergency Applications to the Pennsylvania Supreme Court cannot be considered to have been "fairly presented" to the state's highest court for the purpose of satisfying the exhaustion requirement. In the first of two Applications for Emergency Relief filed with the Pennsylvania Supreme Court, Fiore asked the Court to invoke its King's Bench powers, under 42 Pa.C.S. § 726, and consider his conviction, which had long been affirmed, along with its consideration of the appeal of his co-defendant Dave Scarpone. In the second Application for Emergency Relief Fiore again asked the Pennsylvania Supreme Court to invoke its King's Bench powers and,

apply its decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) to him, although Fiore had no matter pending before any Commonwealth court or district justice.

In *Castille* the habeas petitioner raised various federal claims, "some of which had been raised before the state courts only in one or the other of [petitioner's] unsuccessful petitions for allocatur [discretionary appeal]." 489 U.S. at 346. The United States Supreme Court held that submission of a new claim to a State's highest court on discretionary review does not constitute a fair presentation. "[W]here the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reason [sic] therefor,' Pa.R.A.P. 1114. . . .[5] [r]aising the claim in such a fashion does not, for the relevant purpose, constitute 'fair presentation.' " 489 U.S. 346, 351.

The Pennsylvania Supreme Court may assume jurisdiction of a matter pending before any court or district justice of the Commonwealth under section 726 of Title 42, set out in its entirety herein at Note 3, if the issue is one "of immediate public importance." This criterium of

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[5] Pennsylvania Rule of Appellate Procedure 1114 states as follows: "Except as prescribed in Rule 1101 (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor."

"immediate public importance" is comparable to the criteria of "special and important reasons" for discretionary allowance of appeal set out in Pa.R.A.P. 114 and discussed in *Castille*. In addition, to invoke the state supreme court's extraordinary jurisdiction, a matter must be pending before a court or district justice. For purposes of habeas exhaustion analysis, Fiore's Emergency Applications to the Pennsylvania Supreme Court do not constitute "fair presentation" of the issues.

Second, the conclusion that Fiore exhausted his state remedies through fair presentation of his claims for relief overlooks the fact that Fiore was denied consideration of the federal claims which he raised for the first time in his petition for state post conviction relief on independent and adequate state grounds that would serve to bar federal habeas relief. In appealing to Superior Court the denial by the Court of Common Pleas of Allegheny County of his petition for post conviction relief, Fiore asserted that '[s]uch a result . . . deprives him of the due process of law and the equal protection of the laws and subjects him to cruel and unusual punishment." *Commonwealth v. Fiore*, 445 Pa. Super. 401, 403, 665 A. 2d 1185, 1186 (1995) Appendix, p. 139a. The Pennsylvania Superior Court determined that Fiore was not entitled to post conviction relief because he failed to meet the state statutory requirement that a petitioner plead and prove by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a)(3). The Post Conviction Relief Act states that "an issue has been previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. . . . " 42 Pa.C.S.

§ 9544(a)(2). In seeking post conviction relief, Fiore "urged the trial court to vacate the sentences imposed on the charges of operating a hazardous waste facility without a permit because '[w]hat [appellant] is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." *Commonwealth v. Fiore*, 445 Pa. Super. 401, 409, 665 A.2d 1185, 1188 (1995). Appendix, p. 142a. The Superior Court found the issue presented in Fiore's petition for post conviction relief to have been previously litigated.

> The trial court addressed [on direct review of the judgment of sentence] the present issue in the following terms:
>
> > The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the [DER] for such disposal facility.
> >
> > In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system . . . and, as such, the existence of that permit constitutes an absolute defense to the charges. We find the defendant's contention unpersuasive.

445 Pa. Super. 401, 415, 665 A.2d 1185, 1192, *quoting* Trial Court Opinion, 1/9/88, at 44-48. Appendix, p. 145a. Citing *Commonwealth v. Szuchon*, 534 Pa. 483, 486, 633 A.2d 1098, 1099 (1993), for the proposition that "[i]t is settled law that an issue litigated on direct appeal cannot be litigated again in a post-conviction proceeding." the Superior Court found Fiore ineligible for post conviction

relief. 445 Pa. Super. at 416, 665 A.2d at 1192, Appendix, p. 145a.

"The [independent and adequate state ground] doctrine applies to bar federal habeas when a state could decline to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds." *Coleman v. Thompson*, 501 U.S. 772, 729-730 (1991).

Coleman explains that:

> [i]n the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what . . . [the United States Supreme] Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.
>
> . . .
>
> . . . The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

501 U.S. at 731-732. *Reynolds v. Ellingsworth*, 23 F. 3d 756, 763 (3d Cir. 1994).

For these reasons, the District Court erred in adopting the Magistrate's Report and Recommendations, particularly in its conclusion that the federal courts should entertain Fiore's habeas petition.

B. Fiore Was Subject To No Unusual Circumstances In The Process of the State Courts.

The Magistrate's Report and Recommendation, adopted by the District Court as its basis for the grant of relief, found Fiore entitled to the retroactive application of *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), in part, based on a finding of "unusual circumstances" in the operation of the state courts. This conclusion is in error.

The divergent results reached by co-defendants Fiore and Scarpone do not derive from "unusual circumstances" in the Pennsylvania courts or from any constitutional infirmity requiring the remedial action of the federal courts. Under applicable state rules of court, appellate courts are bound to consider only issues raised in the lower court. Pa.R.A.P. 302(a); *Commonwealth v. Jones*, 542 Pa. 418, 668 A.2d 114, n. 1 (1995); *Commonwealth v. York*, 319 Pa. Super. 13, 465 A.2d 1028 (1983) (new and different theory of relief may not be considered on appeal). While Fiore and Scarpone's convictions both derived from the same factual situation, Fiore and Scarpone each raised different issues on appeals brought before different, state intermediate appellate courts. Each raised different issues in seeking discretionary review by the Pennsylvania Supreme Court. From these divergent paths, different results insued.

On direct appeal, Fiore raised 22 issues before the Pennsylvania Superior Court: among them, whether the evidence was sufficient to sustain the conviction of operating a hazardous waste disposal facility without a permit. In reviewing claims of sufficiency of the evidence the reviewing court is to consider the evidence presented and all reasonable inferences in the light most favorable to the Commonwealth. *Commonwealth v. Stamps*, 493 Pa. 530, 427 A.2d 141 (1981). A claim that evidence was insufficient to support the verdict (Fiore's issue on direct appeal) implicitly accepts that the defendant was properly charged.

On his direct appeal in Commonwealth Court, Scarpone posed that it had been "error for him to be charged in Count 1 of the criminal information with operating a waste disposal facility without a permit when Fiore possessed a permit for the facility." *Scarpone v. Commonwealth*, 141 Pa. Commw. 560, 563, 569 A.2d 892, 893 (1990). Appendix, p. 131a. To resolve this issue, Commonwealth Court engaged in an analysis of statutory construction, a fact which the Magistrate Judge recognized. Report and Recommendation, p. 17, appended to Appellant's brief.

Superior Court and Commonwealth Court each reached "opposing conclusions," to use the Magistrate's term, not from any federal constitutional infirmity or from any other irregularity, but from the fact that Pennsylvania's two intermediate appellate courts were presented with different issues.

There is no constitutional infirmity in the fact that Fiore did not obtain Supreme Court review of his conviction, while his co-defendant Scarpone did. The Magistrate

Judge's report characterizes these different results as "internally inconsistent." Report and Recommendations, p. 14, appended to Appellant's Brief. "Under Pennsylvania law,. . . . allocatur review 'is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.' " *Castille v. Peoples*, 489 U.S. 346, 347 (1989), *quoting* Pa.R.A.P. 1114. In petitioning for allocatur Fiore and Scarpone raised different issues. The Pennsylvania Supreme Court exercised its discretion and reached different conclusions as to the importance of the different issues presented by Fiore and Scarpone. Such a result does not constitute " internal inconsistency." Even if it did, the matter would not call for the corrective action of the federal courts.

It was not "unusual," to use the characterization of the Magistrate, or constitutionally infirm, for the Pennsylvania Supreme Court to refuse either Fiore's first Application for Extraordinary Relief in which he asked the state supreme court to invoke its King's Bench powers and consider his already affirmed conviction along with Scarpone's appeal or his second Application for Emergency Relief in which Fiore asked the state supreme court to invoke its King's Bench powers and apply its decision in *Commonwealth v. Scarpone*, to him.

The so-called "King's Bench" powers of the Pennsylvania State Court are not unbridled. These extraordinary powers are codified at section 726 of the state's judicial code. The section provides:

> Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, *in any matter pending before any court or district justice of this Commonwealth* involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 Pa.C.S. § 726 (emphasis supplied). "Such jurisdiction is to be invoked sparingly, in matters of immediate public importance, and where the petitioner's rights are clearly demonstrated by the record." *Yohn v. Love*, 887 F. Supp. 773, 788 (E.D. Pa. 1995) *citing Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 387 A.2d 425, 430 (1978) *appeal dismissed*, 443 U.S. 913 (1979) For the Court to assume "plenary jurisdiction" of a matter, the matter must be "pending before any court or district justice of this Commonwealth." When Fiore asked the Pennsylvania Supreme Court to invoke its King's Bench powers he had no case pending before any court, or district justice, of the Commonwealth. There was no "matter" of which the Court could take jurisdiction. "The Pennsylvania Supreme Court cannot hear an appeal either by consent of the parties or by its own acquiescence if jurisdiction to hear the appeal is not established by law." *Yohn v. Love*, 887 F. Supp. 773, 787 (E. D. Pa. 1995), *citing* Pa. Const. Art 5, 2(c); *School District of Borough of West Homestead v. Allegheny County Board of School Directors*, 440 Pa. 113, 269 A. 2d 904 (1970). Again, Fiore was not subject to "unusual circumstances" in the disposition of his petitions for extraordinary relief. The Pennsylvania Supreme Court simply – and quite properly – refused to exercise jurisdiction it did not possess.

Further, the retroactive application of *Scarpone* would have been contrary to Pennsylvania decisional law on retroactive application of newly decided cases.

> In reaching this result, we have not overlooked the uniqueness of appellant's situation. Appellant was convicted of operating a waste management facility without a permit, and his conviction was affirmed. His general manager, David Scarpone, was convicted of the same offense, and his conviction was reversed because, the appellate courts concluded, he had a permit. The permit in question was the same, however; it was appellant's as well as Scarpone's. Unsurprisingly, appellant views the situation as unjust.
>
> Nonetheless, the crucial fact is that appellant's direct appeal was no longer pending when the Supreme Court made the ruling which appellant now seeks to have applied to his case. In *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986), our Supreme Court considered "whether full retroactivity of a case encompasses a collateral attack on the conviction." Id. at 354, 516 A.2d at 1181. The Court held that
>
> > a new rule of law to which we give full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue was properly preserved there, or . . . is nonwaivable.
>
> *Id.* at 355, 516 A.2d at 1183. . . . In [*Commonwealth v.*] *Galloway*, [433 Pa. Super. 222, 640 A.2d 454 (1994), *appeal denied*, 538 Pa. 666, 649 A.2d 668 (1994)], for example, this Court held that a

> defendant whose conviction became final when the Supreme Court affirmed his judgment of sentence on September 24, 1981, was not entitled to post-conviction relief based on a ruling set forth in an opinion filed by the Supreme Court on October 19, 1981, barely a month later. We conclude, therefore, that there is no support in the case law of this Commonwealth for the result sought by appellant in this case.

Commonwealth v. Fiore, 445 Pa. Super. 401, 416, 665 A.2d 1185, 1193 (1995) (denying post conviction relief) Appendix, pp. 145a-146a.

In sum, Fiore was subject to no "unusual circumstances" in the process of the state courts. At every step of the process, the conduct of the state courts conformed to established practice. That Fiore obtained a result which displeases him is not a reason for the corrective action of the federal courts.

C. Neither State Law Nor Federal Habeas Law Entitles Fiore To The Retroactive Application of *Scarpone*.

The District Court granted Fiore habeas relief in apparent disregard of the fact that Pennsylvania's application of its decisional law concerning retroactive application of new judicial determinations violated no federal constitutional guarantees, *Blackwell v. State Ethics Commission*, 527 Pa. 172, 181, 589 A.2d 1094, 1098 (1991) (neither federal nor state constitution requires retroactive application of a new decision) and in apparent disregard of the distinction that federal decisional law on retroactivity draws between cases on direct appeal and cases in which

prisoners serving state sentences seek federal habeas corpus relief.

As discussed in the preceding section, Pennsylvania case law on retroactivity follows the basic principle that "even-handed decision making requires that similarly situated individuals *on direct appeal* be treated the same." *Commonwealth v. Brown*, 494 Pa. 380, 385, 431 A.2d 905, 907-08 (1981) (emphasis supplied). Under this general rule "a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occur before the judgment becomes final." *Id.*, at 385-87, 431 A.2d at 906-07. *Commonwealth v. Cabeza*, 503 Pa. 228, 469 A.2d 146, 148 (1983). *Commonwealth v. Metts*, 449 Pa. Super. 275, ___, 669 A.2d 346, 353 (1995) *allowance of appeal granted on other issues*, 544 Pa. 255, 675 A.2d 1238 (1996). The Pennsylvania Supreme Court has held that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final. *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180, 1183 (1986) (adopting the reasoning of *Shea v. Louisiana*, 470 U.S. 51 (1985)).

The retroactivity analysis adopted by Pennsylvania tracks long established federal principles. "Our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review." *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Linkletter v. Walter*, 381 U.S. 618, 627 (1965); *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). *Hamlin v. United States*, 418 U.S. 87 (1974).

The grant of a writ of habeas corpus obtains only when there has been a violation of the Constitution, laws or treaties of the United States. The Federal Constitution neither requires nor prohibits retroactive or prospective application of a new decision. *Linkletter v. Walker*, 381 U.S 618 (1965); *United States v. Johnson*, 457 U.S. 537 (1982). For this basic and over-arching reason, the District Court erred in granting Fiore federal habeas relief through the retroactive application of the Pennsylvania Supreme Court decision in *Scarpone*.

The general rule for federal collateral attack by means of a petition for a writ of habeas corpus is that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989). Only two exceptions obtain: (1) if the new rule of criminal procedure places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; (2) if the new rule of criminal procedure is a watershed rule of criminal procedure. *Id.* at 311.

In *Shea v. Louisiana*, 470 U.S. 51 (1985), the United States Supreme Court explained the rationale for applying full retroactivity to a pending and undecided direct review of a judgment of conviction and denying, or limiting, retroactivity, to a federal collateral attack upon a state conviction which has become final. "[T]he distinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn.

Somewhere, the closing must come." *Id.*, at 354, *quoting* 470 U.S. at 59-60 (1985).

The state's interest in the finality of convictions remains a paramount reason for limiting retroactivity in instances of a federal collateral attack upon a state sentence. In *Brecht v. Abrahamson*, 507 U.S. 619 (1992), Chief Justice Rehnquist, writing the opinion of the court articulated other important considerations.

> The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. . . . The states possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

Id., at 635.

The Pennsylvania State Supreme Court decision in *Scarpone* does not announce a new rule of criminal procedure; it does not place certain kinds of "primary, private individual conduct" beyond the power of the criminal law; it announces no "watershed rule of criminal procedure." *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), is a case wherein a state supreme court construes a state criminal statute. *Scarpone* holds, "[T]he statutory language here [section – of the Solid Waste Management Act] cannot be stretched to include criminal

activities which clearly fall under another statutory section or subsection." 535 Pa. at 279, 634 A.2d, 1009, 1112 The Magistrate's Report and Recommendations at page 17 itself characterizes *Scarpone* as "a statutory construction decision." This accurate characterization of *Commonwealth v. Scarpone* as a case of statutory construction presents yet another reason why the District Court erred in granting Fiore federal habeas relief through its retroactive application. The United States Supreme Court has made plain that a state is not constitutionally compelled to make retroactive new construction of state statutes. In *Wainwright v. Stone*, 414 U.S. 21 (1973), the Supreme Court reversed the grant of habeas relief to petitioners who had sought to have their convictions reversed by retroactive application of a Florida Supreme Court decision declaring the statute under which they had been convicted void for vagueness. The U.S. Supreme Court held that the law was not void at the time of the convictions, and found no constitutionally compelled reason for Florida to vacate previously obtained convictions in the wake of a new construction of state law. While there are differences between the facts of the instant petition and those of *Wainwright v. Stone*, the factual differences do not negate the application of the underlying principle of *Wainwright v. Stone:* that Pennsylvania had no obligation to apply the statutory construction of the Solid Waste Management Act as obtained in *Scarpone* to Fiore who had never raised an issue of statutory construction of the Solid Waste Management Act and whose conviction had long been final when *Scarpone* was decided.

The Magistrate's Report and Recommendation wrongly designates *Davis v. United States*, 417 U.S. 333

(1974), as setting the standard for retroactive application of a substantive change in the criminal law to a person in state custody. *Davis* concerns proceedings brought under 28 U.S.C. § 2255, which permits a federal prisoner to challenge his conviction as violative of the Constitution or laws of the United States. Such proceedings do not implicate the concerns of state sovereignty which the Supreme Court has recognized as being of paramount importance in proceedings brought by state prisoners, such as Fiore, under 28 U.S.C. § 2254. The holding of *Davis*, that a federal prisoner proceeding under 28 U.S.C. § 2255, is not precluded from seeking application of new law made since his trial and appeal, has no application to a state prisoner attacking his conviction under 28 U.S.C. § 2254 where questions of federalism and comity are paramount.

Similarly, the Magistrate's use of *United States v. Woods*, 986 F.2d 669 (3d Cir. 1992), as a vehicle to justify the grant of a writ of habeas corpus to a person in state custody is misplaced. *Woods* concerns direct review of an district court's denial of a motion to correct an illegal federal sentence. Because it concerns the review of a federal sentence, *Woods* does embrace the concerns of federalism and comity inherent in federal review of a state conviction. Accordingly, *Woods* has no proper application to the instant habeas petition of a person in state custody.

"The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1992), *collecting cases*. "The role of federal habeas proceedings, while important in assuring that constitutional rights are

observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The United States Supreme Court reiterated this principle in *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), writing that is is it [sic] "axiomatic – that federal habeas courts do not sit to re-examine state court determinations of state law." This Court has recognized that "federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Geschwendt v. Ryan*, 967 F. 2d 877, 888-889 (3d Cir. 1992).

Fiore, as discussed in sub-section "A," was afforded the orderly process of the state courts. The decision of the Pennsylvania Supreme Court in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), Appendix, p. 135a., is one of statutory construction. The Magistrate's Report at page 17 also characterizes *Scarpone* as a case if [sic] statutory construction. The federal constitution does not compel the retroactive application of new construction of state statutes – the result which Fiore sought and which the District Court provided. It was plain error for the federal Magistrate to have found that Fiore was denied "due process of law and equal protection of the law" by the Pennsylvania Supreme Court's failure to give Fiore the benefit of the retroactive application of *Scarpone*. This Court recently said, "[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause." *Johnson v. Rosemeyer*, No. 96-1861, slip op. at 11 (3d Cir., June 13, 1997) (affirming the denial of federal habeas relief to a state prisoner). Where, as here, there was no error of state law, the same basic principle

obtains: a federal claim cannot be made out simply by invoking the names of federal constitutional guarantees such as due process and equal protection of the law.

Fiore is much like the petitioner in *Johnson*, supra, of whom this Court wrote, "Johnson's problem is that he cannot point to a federal requirement that jury instructions on the elements of an offense when justification is an issue include particular provisions, nor can he demonstrate that the jury instructions deprived him of a defense which federal law provided to him." *Johnson*, supra, slip op. at 13. Fiore has cast his otherwise unreviewable claim as one implicating "due process and equal protection." Appendix, P. 151a. Simply invoking constitutional guarantees does not entitle Fiore to relief.

This Court recently said

> in a habeas corpus case, a federal court, unlike a federal court in a diversity of citizenship case, does not substitute for a state court. . . . [A] federal court in a habeas corpus case [must] be circumspect in re-examining state court decisions. . . . [A] federal habeas corpus proceeding is not an appeal from the underlying state proceeding.

Johnson v. Rosemeyer, No. 96-1861, slip op. at 20 (3d Cir. June 13, 1997) By granting Fiore federal habeas relief, the District Court has substituted itself for the state Supreme Court. For this reason, this Court should vacate the District Court order granting Fiore federal habeas relief.

II. IF THIS COURT AFFIRMS THE GRANT OF HABEAS RELIEF, THE CASE SHOULD BE REMANDED FOR RE-SENTENCING.

If this Court affirms the grant of federal habeas relief to Fiore, the Commonwealth respectfully requests the Court to remand for resentencing under authority of *Commonwealth v. Goldhammer*, 512 Pa. 587, 517 A.2d 1280 (1986). *Goldhammer* holds "that where a defendant appeals a judgment of sentence, he accepts the risk that the Commonwealth may seek a remand for resenting thereon if the disposition in the appellate court upsets the original sentencing scheme of the trial court." 512 Pa. at 593, 517 A.2d 1280, 1283. As this Court stated, "When a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan." *United States v. Busic*, 639 F. 2d 940, 947 n. 10 (3d Cir. 1981) *cert. denied*, 452 U.S. 918.

Between February 4 and February 18, 1986, Fiore and his co-defendant Dave Scarpone were tried before the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County, Pennsylvania and a jury. On February 18, 1986, Fiore was found guilty of the following charges: disposing of hazardous waste and operating a hazardous waste facility without a permit (two counts); 35 P.S. § 6018.401(a); discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of residual wastes and operating a residual waste facility contrary to his permit, 35 P.S. § 6018.302(a); perjury, 18 Pa.C.S. § 4902; obstruction of administration of the law, 18 Pa.C.S. § 5101; and criminal conspiracy, 18 Pa.C.S. § 903.

On July 2, 1986, Fiore was found guilty in a non-jury trial of additional charges not involving Scarpone but arising from the same factual situation as the charges tried during the February 1986 trial. Fiore was found guilty of: discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, 35 P.S. § 6018.401(a); disposing of residual wastes and operating a residual waste facility without permit (45 counts), 35 P.S. § 6018.302(a); using his property and the property of another as a solid waste disposal area without a permit (two counts), 35 P.S. § 6018.501(a); and disposing of residual wastes and operating a residual waste facility without a permit (four counts), 35 P.S. § 6018.301.

On April 10, 1987, Fiore was sentenced on the convictions from both trials, resulting in an aggregate sentence of six to twelve years in prison and a $200,000 fine. For his conviction of operating a hazardous waste facility without a permit in violation of the Solid Waste Management Act, 35 P.S. § 6018.401(a) (Count 1, tried February 1986), Fiore was sentenced to two and a half to five years in prison and ten years probation and fined $100,000. On Count 2, violating § 6018.40(a) (tried July 1986), Fiore was sentenced to two and a half to five years in prison, the sentence to run consecutively to the sentence imposed at Count 1. On his conviction of perjury (Count 5, tried in February 1986), Fiore was sentenced to one to two years imprisonment and five years probation.

Absent the convictions relating to operation of a hazardous waste disposal facility without a permit, the lower court might have chosen to impose sentences on Fiore's

conviction of 18 Pa.C.S. § 5101, obstruction of administration of the law, a second degree misdemeanor which carries, by application of 18 Pa.C.S. 106(b)(7), a maximum term of imprisonment of two years. The lower court may have chosen to impose a greater sentence on the conviction of perjury, 18 Pa.C.S. § 4902, a third degree felony which carries a maximum term of imprisonment of seven years, by authority of 18 Pa.C.S. § 106(b)(4).

CONCLUSION

For the reasons stated herein, Appellants respectfully request this Honorable Court to vacate the order of the United States District Court for the Western District of Pennsylvania entered April 25, 1997 at Civil Action No. 96-1231 granting the petition for a writ of habeas corpus.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERS

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit, having been admitted November 23, 1988.

/s/ Andrea F. McKenna
Andrea F. McKenna, Esquire

* * *

ATTACHMENTS EXCLUDED

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM FIORE	:	
	:	Docket No.
v.	:	97-3288
GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Appellants	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing **Brief for Appellants and Appendix** upon the person(s) and in the matter indicated below:

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Dated: July 7, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-3288

WILLIAM FIORE

Appellee,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

BRIEF OF APPELLEE

Appeal from the Order entered April 25, 1997, by the Honorable Gary L. Lancaster of the United States District Court, Western District of Pennsylvania, at D.C. NO. 96-CV-01231, granting petition for a writ of habeas corpus

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I. STATEMENT OF ISSUES RAISED

Appellee raised two related and intertwined issues in his Petition for Writ of Habeas Corpus. The first is whether Appellee was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged. That is, whether the evidence was insufficient to support the conviction. The second issue is whether the Pennsylvania Courts denied Appellee due process and equal rights by refusing to grant him benefit of the Pennsylvania Supreme Court's decision in *Scarpone*. That is, by refusing to give retroactive effect to that decision, Appellee is serving and has served years incarcerated on the basis of facts which do not constitute the crime for which he was convicted.

Although Appellee, through counsel, did everything to try to avoid the incongruous result that presently exists, he is still placed in the position of having to proceed by way of Writ of Habeas Corpus in the federal courts to seek justice and vindication of his right to due process and to be treated fairly and equally in this matter. That Appellee's actions did *not* constitute a crime, has been specifically and clearly decided by the Supreme Court of Pennsylvania.

II. STATEMENT OF FACTS

The relevant facts presented are not in dispute. Appellee, William Fiore, owned and operated a hazardous waste facility in western Pennsylvania under permit from the state's Department of Environmental Resources ("DER"). He, together with his employee Dave Scarpone, was charged with various criminal counts, including the operation of a hazardous waste disposal facility *without a permit* in violation of the Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony.

The essence of this charge against Appellee and Mr. Scarpone was that they criminally operated a hazardous waste facility "without a permit".

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revocate or suspend that permit, or must it be worded so in the permit?" (Supplemental Appendix[1] at 42).

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Appellee's counsel suggested that the proper answer to both parts of the jury's question was "no", because pursuant to the Pennsylvania Administrative Code, §§ 1917(a) and 1921(a), no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal

---

[1] "Supplemental Appendix" refers to the supplemental appendix filed by Appellee Fiore and will be referred to hereinafter as "Supp'l. App."

such revocations, suspension or modification to the Environmental Hearing Board. The Commonwealth's counsel argued that a permit is granted for a specific activity and if the permittee alters that activity so as to commit conduct which is "clearly beyond the pale of the four corners of the permit", then there is "no permit." Upon considering the argument of all counsel, the Court instructed the jury as follows:

> THE COURT: Ladies and Gentlemen of the Jury: Your question is an indication to counsel and the court of the diligence with which you apply yourself to your responsibility. Your question focuses on a very intricate legal issue which is involved in this case, and we are not surprised that you focused on that issue in view of your application to your responsibility.
>
> Your question is in two parts. The first part asks, "By law, does a permit violation automatically revocate or suspend that permit?" The answer to that question is no. The second part of the question is: "Or must it be worded so in the permit?" The answer to that question is that it is not necessary that a permit as a matter of law specify all the ways in which it may be violated and thereby revoked. It does not have to specify the ways in which it may be violated or revoked.
>
> In order to help you understand the allegations, I would like to amplify those answers.
>
> Clearly, the MIDC facility had a permit to operate a hazardous waste facility. You know that's been made clear during the course of the case. And, as a matter of law, every violation of the conditions of that permit would not result.

> There is a way in which violations are handled. In fact, you heard testimony with regard to violations and the way those violations were handled.
>
> The allegations in this case are that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation of a hazardous waste facility.
>
> The question of fact for you to decide is, on what testimony will you hang your hat. In other words, whom you believe and whom you do not believe.
>
> Secondly, was the violation or the alteration so substantial a part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit?
>
> These are questions of fact for you to answer.
>
> I hope that gives you some better understanding of the law and will help you reach a verdict in this matter.
>
> You may return to deliberate.

Thereafter, the jury returned with a verdict of guilty as to both Appellee and Mr. Scarpone. Appellee was sentenced to a total of five to ten years in prison, fined $200,000.00 and placed on probation for twenty-five years. Each co-defendant appealed to the Superior Court of Pennsylvania. On its own motion, the Superior Court transferred the appeals to the Commonwealth Court. On

Appellee's motion, the Commonwealth Court transferred his appeal back to the Superior Court, but it retained the Scarpone appeal.

Mr. Scarpone's appeal was decided by the Commonwealth Court in a reported case at *Commonwealth v. Scarpone*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd* 634 A.2d 1109 (Pa. 1993). The Commonwealth Court held that since Appellee had a permit to operate the facility, his employee Mr. Scarpone could not be convicted of operating a waste disposal facility *without a permit;* Mr. Scarpone's conviction was reversed. The Commonwealth appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania.

Appellee's appeal to the Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum Opinion, *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989). The Supreme Court denied Fiore's petition for allowance of appeal.

The Supreme Court granted the Commonwealth's petition for allocatur in *Scarpone* so as to resolve the conflicting decisions between the Superior and Commonwealth Courts. Although he had exhausted his appeal process, Appellee Fiore petitioned the Pennsylvania Supreme Court to reconsider his conviction in conjunction with its review of the *Scarpone* case, by Emergency Application for Extraordinary Relief, at No. 9 W.D. Misc. Dkt. 1992. (Supp'l. App. at 1). By that Petition, Appellee offered the Pennsylvania Supreme Court a district opportunity to eradicate this unfair and unequal application of the law in a timely manner. The commonwealth cannot now be heard to argue that Appellee is remiss in raising

this issue on a federal forum. Appellee pursued every avenue available to him to obtain timely and appropriate relief in the state system. The Court recognized the identity of the situations in *Scarpone* and *Fiore* when, in its opinion affirming the Commonwealth Court reversal of Scarpone's conviction, the Supreme Court held:

> The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations. *We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit* against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Commonwealth v. Scarpone, 634 A.2d 1109 (Pa. 1993) (emphasis supplied). It bears repeating that the permit which Mr. Scarpone had was the permit of his employer, Appellee William Fiore.

The Supreme Court noted that a more appropriate charge against Mr. Scarpone and Appellee could have been brought under alternative provisions of the statute. However, it concluded:

> the alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility *without a permit* is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 P.S. § 1928(b)(1).

Scarpone, 634 A.2d at 1112 (emphasis in original). Refusing to condone the "bald fiction", the Supreme Court affirmed the commonwealth Court's reversal of Scarpone's conviction.

Thereafter Appellee filed another Emergency Application for Extraordinary Relief to the Supreme Court of Pennsylvania, at No. 7 W.D. Misc. Dkt. 1994, by which he requested the Court exercise its extraordinary King's Bench powers, and give him the benefit of the Court's decision in *Scarpone*. That application was denied. (Supp'l. App. at 60).

Appellee then filed a motion for post-conviction collateral relief with the trial court (Supp'l. App. at 9). Appellee again requested that the Supreme Court's *Scarpone* decision be applied to him. The trial court denied the motion for post-conviction collateral relief and its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995) (App. at 139a).

In affirming the lower court's denial of Appellees PCRA petition, the Superior Court framed the relevant issue as follows:

> At the heart of this appeal is the fact that although appellant's employee and co-defendant, David Scarpone, has obtained from the courts of this Commonwealth a reversal of his conviction on the charge of operating a hazardous waste facility without a permit, appellant had failed to obtain the same relief. Such a result, appellant contends, deprives him of the due process of law and the equal protection of the laws and subjects him to cruel and unusual punishment.

Id. at 1186. The Superior Court affirmed the PCRA denial not on the merits, but upon determining that Appellee had previously exhausted this issue on direct appeal;

and, pursuant to the PCRA, such exhaustion on direct appeal precluded PCRA relief. The Court wrote:

> One such [PCRA] requirement is the obligation to plead and prove by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a)(3). Section 9544 explains in pertinent part that "an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue . . . 42 Pa.C.S. § 9544(a)(2).
>
> We agree with the trial court that appellant has failed to meet this requirement. As noted earlier, this Court disposed of the twenty-two issues in appellant's direct appeal by affirming on the trial court's opinion. The trial court addressed the present issue in the following terms:
>
> > The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the [DER] for such disposal facility.
> >
> > In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system . . . and, as such, the existence of that permit constituted an absolute defense to the charges. We find the defendant's contention unpersuasive.

Id. at 1192 (emphasis supplied).

Appellee is presently incarcerated in the State Correctional Institution at Pittsburgh, Pennsylvania on a five-

to-ten year sentence for committing acts which the Supreme Court of Pennsylvania, under identical facts, has specifically held were never criminal under the penal provisions charged.

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellee is aware of no related cases or proceedings.

IV. STATE OF STANDARD OR SCOPE OF REVIEW

Review of a district court's decision to grant a writ of habeas corpus is plenary when the district court did not hold an evidentiary hearing and engage in independent fact-finding. *McAleese v. Mazurkiewicz*, 1 F.3d 159 (3d Cir. 1993); *Kontakis v. Beyer*, 19 F.3d 110 (3d Cir. 1994).

V. SUMMARY OF THE ARGUMENT

Appellee Fiore is unconstitutionally confined on the basis of a conviction for operating a hazardous waste facility without a permit. The uncontested facts are that, at all relevant times, Appellee did possess the requisite permit.

Appellee's conviction without sufficient evidence constitutes a violation of due process. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979). Appellee exhausted this claim during his direct appeals in the state courts.

Appellee's second argument is that the state courts violated both his due process and equal protection right

to retroactive application of the Pennsylvania Supreme Court's subsequent decision in *Commonwealth v. Scarpone*, wherein it concluded, upon identical facts, that Appellee's employee was improperly convicted of operating a hazardous waste facility without a permit.

This issue was exhausted in state proceeding both by Appellee's Kings Bench petitions and by way of his post conviction petition for relief.

Further, Appellee contends that the *Scarpone* decision is not a "new statement of law" which cannot be retroactively applied. Rather, in *Scarpone* the Court simply ruled, based on a [sic] well-established principles, that Scarpone's (and Appellee's) possession of a permit negated a finding of guilt under the statutory section charged.

If, however, this Court concludes that the *Scarpone* decision did constitute a new rule of law, the Court may still find that Appellee's due process and equal protection rights were violated by the state courts' refusal to apply *Scarpone* retroactively to Appellee.

VI. DISCUSSION

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner Fiore's conviction and incarceration run afoul of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution in that he is currently incarcerated on the basis of facts that never constituted a crime under the section

of the Pennsylvania crimes Code upon which he was charged and convicted.

Appellee Fiore is confined at the State Penitentiary under a sentence of 5 to 10 years, $200,000.00 in fines, costs, and 25 years probation for committing acts which the highest court of Pennsylvania conclusively found did not constitute a crime under the sections charged of the Solid Waste Management Act.

A. DUE PROCESS – INSUFFICIENCY OF THE EVIDENCE

Resolution of this matter may simply be based on the clear and undisputed fact that the Commonwealth did not prove, beyond a reasonable doubt, each essential element of the crime charged. That is that, as a matter of law, the evidence was insufficient and thus, Appellee Fiore was improperly convicted and is currently being unconstitutionally detained.

In *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at 1073.

Following *Winship*, the Court later logically ruled that claims of insufficiency of the evidence upon which to base a conviction are cognizable as a due process violation reviewable by writ of habeas corpus. *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2790. In reviewing

challenges to the sufficiency of the evidence, the question for habeas courts is not whether there was any evidence to support a conviction, but "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Sullivan v. Cuyler*, 723 F.2d 1077 (3d Cir. 1983) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979) *Paullet v. Howard*, 634 F. 2d 117 (3d Cir. 1980). *See, generally, United States v. Messerlian*, 832 F.2d 778, 796 (3d Cir. 1987).

The statutory section under which Appellee was convicted reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . unless such person . . . has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department [of environmental resources].

35 P.S. § 6018.401(a). An essential element of this crime is the lack of a permit. The Commonwealth does not dispute that Appellee Fiore possessed a DER-authorized permit to operate his facility at all relevant times.

Appellee argued during his criminal trial and on direct appeal that his possession of a permit constituted an absolute defense to this crime. That is, the undisputed evidence was clearly insufficient to establish each element of the crime. And, in fact, that is exactly what the Pennsylvania Supreme Court ruled in *Scarpone*.

Appellee raised and exhausted this issue on direct appeal.[2]

Thus, this Court may conclude its analysis at this point. Appellee is unconstitutionally incarcerated an [sic] the basis of undisputed facts that he was convicted of an offense for which the Commonwealth was unable to establish each and every essential element.

B. EXHAUSTION OF DUE PROCESS/SUFFICIENCY OF THE EVIDENCE

The general principles covering the responsibility of the petitioner to exhaust all federal claims are well-established. The exhaustion requirement is satisfied when the state courts have had an opportunity to pass upon and correct alleged constitutional violations. *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1230 (3rd Cir. 1992).

Of particular significance is whether the federal claim has been "fairly presented" to the state courts. *See,*

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[2] In its Brief on Appeal, the Commonwealth wrote:

> The issues raised by Fiore on direct appeal were as follows: . . . (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; . . .
>
> * * *
>
> Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim.

Appellant's Brief at 6-7.

Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509 (1971). This requires that the claim brought in federal court be the substantial equivalent of that presented to the state courts. *Santana v. Fenton*, 685 F.2d 71, 74 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1115, 103 S.Ct. 750 (1983). Both the legal theory and the facts underpinning the Federal claim must have been presented to the state courts, *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3rd Cir. 1986), and the sane Method of legal analysis must be available to the state court as will be employed in the federal court. *Santana*, 685 F.2d at 74.

It is undisputed that Fiore's challenge to the sufficiency of the evidence to support his conviction was raised and fully litigated through the state system; however, it was not expressed as a federal due process violation on direct appeal.

Nonetheless, the Third Circuit looks to the substance of a claim presented to the state courts, rather than its technical designation. *Evans*, 959 at 1231 (citing *Bisaccia v. Attorney General of the State of New Jersey*, 623 F.2d 307 (3rd Cir. 1980). In *Bisaccia*, a state prisoner argued unsuccessfully in the state courts that the trial court had erred in allowing into evidence the guilty plea of a co-conspirator without a limiting instruction. In his habeas petition, Bisaccia asserted for the first time that admitting the contested evidence violated his Fourteenth Amendment due process rights. On appeal, this Court reasoned that the Petitioner's state claim had led the New Jersey Supreme Court into "a method of analysis consistent with Fourteenth Amendment due process determinations." *Id.* at 311. And, because the substance of the Appellant's state claim was virtually indistinguishable from the due

process allegation and because the method of analysis was indistinct, exhaustion of state remedies had been met. *Id.* at 312.

The facts in *Evans v. Court of Common Pleas* are virtually indistinguishable from those at issue here. Therein, the habeas petitioner alleged that the facts were insufficient at her state court trial to support her conviction of third degree murder. The District Court dismissed her habeas petition contending that she had not exhausted this due process claim on direct appeal to the state courts.[3] On appeal, however, the Third Circuit recognized that:

> Although "substantive deviations between superficially similar federal and state claims often exist," if an individual's claim, arising under and asserted in terms of state law, is "functionally identical – a point of more than trifling concern" to the federal claim, "we must regard the federal claim as fairly presented."

595 F.2d at 1231 (*citing Nadworny v. Fair*, 872 F.2d 1093, 1099-1100 (1st Cir. 1989)).

Further, the *Evans* Court determined that the test for insufficiency of the evidence is the same under both

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[3] In the appeal to the Superior Court *Evans* challenged the sufficiency of the evidence without invoking the term "due process". However, in her petition for allocatur to the State Supreme Court, Evans challenged the sufficiency of the evidence as a violation of the United States Constitutions Due Process Clause. The District Court found this difference in phrasing to be fatal to Evans' habeas claim that the evidence was constitutionally insufficient.

Pennsylvania and federal law. That is, "the test for determining sufficiency of evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime had been established beyond a reasonable doubt." 595 F.2d at 1232. In addition, the *Evans* Court noted that the Petitioner's insufficiency of the evidence claims qualified as an "assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution." *Id.* (*citing Dave v. Attorney General of New York*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc.)).

The Supreme Court's holding in *Jackson v. Virginia*, that "a challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a constitutional claim" establishes that an insufficiency of the evidence claim necessarily implicates Federal due process rights. *Evans*, 959 F.2d at 1233.

Based on this Court's ruling in *Evans v. Court of Common Pleas*, it is clear that Appellee has exhausted his Constitutional claim of the insufficiency of the evidence at all levels of state review and, thus, this claim is ripe for review.

C. DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Appellee's second contention is that he was denied due process and equal protection of the laws when the

state courts refused to apply the Supreme Court's *Scarpone* decision to him on either his King's Bench or PCRA petitions.

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws." (emphasis supplied). As the Supreme Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846 (1948). At bottom, the Equal Protection Clause guarantees that local, state and the federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications which lead to invidious discrimination. *See Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941 (1979).

Not all differential treatments by government are proscribed; nor are all government-made classifications or differential-treatments reviewed under the same standard. Statutes or actions which purposefully impair a fundamental right or deal with a "suspect classification," are subject to "strict scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973). Under this standard of review, the government-made

classification or treatment is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972).

In the absence of either purposeful impairment of a fundamental right or suspect classification, a less rigorous standard of review is applied. This standard of review is often referred to as the "mere rationality" standard. *See Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337 (1911). When this standard is applied, the judicial inquiry is limited to ascertaining whether the classification in issue bears a rational relation to a permissible governmental objective. *See Cleburne, Texas*, 473 U.S. 432, 105 S.Ct. 3249; *Metropolitan Life Insurance Co. v. Ward*, 470 U. S. 869, 105 S.Ct. 1676 (1985); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337 (1911) (law will be stricken only if "purely arbitrary").

Involved here is impairment of Petitioner's fundamentally protected right to liberty.[4] Accordingly, the

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[4] The concept that personal liberty is a fundamental protected right underlies the basic reasoning for the federal habeas statute. In *Lehman v. Lycoming County Children's Services*, 648 F.2d 135 (3d Cir. 1981), the Court recognized that the primary purpose of federal habeas proceedings is to protect a citizen's fundamental right to be free of being wrongfully held in custody. It is the allegation of an unlawful restriction on personal liberties which compels the court to review an otherwise final decision; that is, improper restrictions on personal liberties outweigh the otherwise compelling interest in the finality of litigation. *Id.* at 139.

Commonwealth must establish a compelling reason for its refusal to treat Petitioner similarly to Mr. Scarpone.

The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 2975 (1974). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). A penal statute "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976).

The facts clearly establish that Appellee has been treated dissimilarly from Mr. Scarpone, based on the evidence and law, and that the Commonwealth has no compelling reason for this difference. Appellee petitioned the

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As Justice Brennan wrote for the Supreme Court majority in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963):

> Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Id. at 424, 83 S.Ct. at 841.

The strength of the protected nature of individual freedom is such that courts even recognize that an individual on parole may be considered "in custody" for purposes of the habeas statute. *See Carafas v. LaVallee*, 391 U.S. 234, 242, 88 S.Ct. 1556, 1561 (1988) (referencing *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373 (1963)).

Supreme Court of Pennsylvania to exercise its extraordinary powers, no less than three times, so as to afford him treatment equal to that afforded Mr. Scarpone.

Case law, as set forth below, supports Petitioner's contention that he has been denied due process and equal protection of the law of Pennsylvania. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), the Court was faced with a factual situation similar to the one at bar; on a writ of *coram nobis*, it was asked retroactively to apply a Supreme Court decision to a prior conviction. In deciding to grant the writ, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971), and determined that its decision was based on "the simple and universal rule that a judgement in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law" and that this is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Liguori*, 438 F.2d at 669.

Similarly, in *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298 (1974), the Court stated that if the habeas petitioner's contentions were true that his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305.

In *Davis* the petitioner was prosecuted and convicted for failure to report for military induction. In that case, the selective service board had declared him a delinquent and ordered the petitioner to report for induction, even though he had not been found acceptable for military service prior to that time. On direct appeal, the petitioner challenged the local board's application of various military regulations by which they ordered him to report for induction prior to having been found acceptable for service in the Armed Forces. While that appeal was pending, the Supreme Court of the United States announced its decision in *Gutknecht v. United States*, 396 U.S. 295, 90 S.Ct. 506 (1970), wherein it concluded that selective service regulations that accelerated the induction of delinquent registrants were punitive in nature and without legislative sanction. Accordingly, the appeals court remanded Davis's case back to the trial court for further review based on *Gutknecht*. Thereafter, the trial court determined that Davis's induction had not been accelerated because of his delinquency status.

While Davis's second appeal was pending, the Ninth Circuit decided *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which had facts virtually identical to those in *Davis*, including the trial court's decision that Fox's induction order was not accelerated by the duration of delinquency. On appeal, the Ninth circuit reversed Fox's conviction on the authority of *Gutknecht*. The court of appeals affirmed Davis's conviction and he commenced serving his sentence.

Davis subsequently filed a *habeas corpus* action in which he asserted that the *Fox* case had effected a change

in the law and that its holding required that his conviction be set aside. The court of appeals determined that its decision on direct appeal was the law of the case and that its intervening decision in *Fox* would not be applied in a collateral attack on Davis's conviction. The Supreme Court granted certiorari and ruled that Davis could raise this issue by way of collateral attack, even though it was a matter of statutory construction, because the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and presented "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305 (citation omitted).

Finally, based on the facts in *Davis*, which are essentially the same as in the instant case, the Supreme Court concluded:

> In this case, the petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

117 U.S. at 346-47, 94 S.Ct. at 2305 (internal citations omitted).

Here, as in *Davis*, Appellee Fiore is incarcerated for actions that are not criminal, as determined by the highest court of Pennsylvania. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's rights to due process and the equal application of the law. Further, it constitutes a situation cognizable under the habeas corpus statute.

D. EXHAUSTION OF DUE PROCESS/EQUAL PROTECTION CLAIM

A habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982). To demonstrate compliance, the petitioner must show that the claim he asserts in federal court has been "fairly presented" to the state courts. *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971); *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989). As previously set forth, Appellee diligently petitioned the courts of Pennsylvania to grant him the benefit of the Supreme Court's decision in *Scarpone*. In state court proceedings, the Commonwealth contended that the issue Appellee raised on direct appeal, stated as an insufficiency of the evidence argument, was not the same argument made by Scarpone on direct appeal. Scarpone's direct appeal was stated in terms of the commonwealth's failure to follow administrative procedure to revoke the permit.

To the extent the Commonwealth raises this contention here, Appellee suggests that this is a distinction without a difference. In fact, the Pennsylvania Supreme Court disregarded this difference in approach, and

granted allocatur precisely because of the existence of two opposing decisions by the intermediate appellate courts. (Ex. 2). In its PCRA Opinion, the Court of Common Pleas disregarded the Commonwealth's attempted detour. By way of a PCRA petition, Appellee requested the state courts to afford him retroactive effect to the *Scarpone* decision, alleging failure to do so would violate his right to due process and equal protection. The Post-conviction court's ruling which denied petitioner retroactive application of the Supreme Court's *Scarpone* decision was based entirely on its conclusion that Appellee had no right to the benefit of a "new rule of law in any matter on collateral review unless the decision was handed down during the pendency of the [petitioner's] direct appeal." (Supp'l. App. at 23).

In denying Appellee's appeal from the post-conviction court, the Superior Court noted that Appellee, there appellant, had litigated (exhausted) the primary issue raised in his post-conviction petition, that he was unfairly convicted and sentenced for conduct which did not constitute a crime. (App. at 139a)

E. RETROACTIVE APPLICATION OF *SCARPONE* DECISION

The principal of nonretroactivity prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 114 S.Ct. 948, 953 (1994) (citing *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 1139 (1992)).

In 1989, the Supreme Court decided *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), in which it clarified how the question of retroactivity should be resolved for cases on collateral review. *Teague* involved a collateral challenge to the conviction of a black defendant by an all-white Illinois jury after the prosecutor used his ten peremptory challenges to strike blacks from the jury. Petitioner filed a writ of habeas corpus and asked the Court to extend the Sixth Amendment's fair cross-section requirement to petit juries. A plurality of the Court refused to reach the merits, holding that new rules of law should not be applied retroactively on collateral review. "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S.Ct. at 1075 (footnote omitted).

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070. Thus to determine whether a ruling is "new," this Court must "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the constitution." *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260 (1990).

It can be argued that this Court need not deal with the issue of retroactivity, because Appellee and his Co-defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. However, if this Court does apply a retroactivity analysis, it

must first determine if Appellee is seeking the application of "new" rule. Even if the Court determines that the Appellee seeks the benefit of a new rule, the Court must decide whether that rule falls within one of the two narrow exceptions to the non-retroactivity principle. *See, Gilmore v. Taylor*, 508 U.S. 333, 113 S.Ct. 2112, 2113 (1993).

The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307, 109 S.Ct. at 1073 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *See, Saffle v. Parks*, 494 U.S. at 495, 110 S.Ct. at 1264. This second exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson*, 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), aff'd, 536 F.2d 1013 (3d Cir. 1976).

In determining whether the Supreme Court in *Scarpone* had issued a "new rule of law," we begin an analysis by review of that decision. The Court's succinct opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, the decision is simply based on the black letter principal that penal statutes must be strictly construed. The *Scarpone* decision is one of straight forward statutory construction; in no way does it revise or reverse previous case law, nor has the Commonwealth posited such an argument. Moreover, this principal itself is embraced by statute. *See* 1 Pa. Cons. Stat. § 1928(b)(1).

Further, a review of Pennsylvania case law reveals no decisions upon which the Commonwealth could reasonably have relied in prosecuting Appellee under its interpretation of the law. The obvious result reached by the state Supreme Court was first reached by the Commonwealth Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather only interpreted an existing statute. This construction is supported by decisions of the United States Supreme Court. For example, in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), the Supreme Court considered the scope of the mail fraud statute, 18 U.S.C. § 1341, which prohibits the use of mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The Court held that the mail fraud statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government.[5]

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[5] Petitioners in *McNally* had been charged with devising a scheme to defraud the citizens of Kentucky of their intangible right to have the state's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. The jury was instructed to convict if it found either of two schemes to exist. One scheme involved a deprivation of property rights, but the other involved only the deprivation of the intangible right to good government. The Supreme Court reversed the Petitioners' convictions because the jury had not been required to find that the state was defrauded of any money or property in order to convict.

Subsequent to the Supreme Court's decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett*, ___ F. Supp. ___ (No. 87-C-8978) (85 CR 284 1988) (Supp'l. App. 28), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of his petition was the Supreme Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals.

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a way consistent with the terms of the statute.

Other courts have collaterally set aside mail fraud convictions, based on the retroactive application of *McNally*. *See, United States v. Wade*, 672 F.Supp. 864, 875 n.5 (D.Md. 1987). The *Wade* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos:*

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may ➔ be subjected to punishment for crime in the

> federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck*, 318 U.S. at 243, "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners, conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

United States v. Mandel, 672 F. Supp. 864, 873-874 (D.Md. 1987) (citations omitted). Likewise, in Pennsylvania, the courts may not create crimes, but rather are confined to a strict construction of the Criminal Code. *See*, 1 Pa. Cons. Stat. § 1928(b)(1); *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (penal provisions of a statute must be strictly construed).

Similarly in the instant case, the Pennsylvania Supreme Court's decision that Mr. Scarpone's [and Appellee's] conduct did not constitute a violation of the criminal charge imposed does not constitute a new rule of law.

The general rule against the retroactive effect of a "new" statement of law generally involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), and *Miranda v. Arizona*, 384 U.S. 436,

86 S.Ct. 1602 (1966).[6] As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are retroactively applied only if they affect the truth-finding process. Here, however, the Pennsylvania Supreme Court's ruling the *Scarpone* [sic] simply decided which of two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct and, critically, what are the actual elements of the offense.

The Commonwealth cannot argue that it was surprised by the Supreme Court's decision. Indeed the very issue underlying this scenario, that is whether the permit was repudiated by Appellee's and Mr. Scarpone's actions, was raised during the course of the trial when the Judge was asked to clarify the instructions to the jury.

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[6] A review of the key federal cases in this area reveal the courts have systematically denied retroactive application of new criminal procedural rulings. In *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), the Court refused to apply the Fourth Amendment exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), retroactively. In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967), the Court held that the right to counsel at line-ups afforded in *Wade v. United States*, 388 U.S. 218, 87 S.Ct. 1926 (1967), was applicable only to line-ups occurring after the date of the *Wade* decision. In *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969), accorded only prospective application to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), which excluded limits of non-authorized electronic surveillance. Informed consent rule in *Miranda v. Arizona*, not applied retroactively, *see Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966).

If this Court determines that *Scarpone* was a "new rule" then, Appellee contends, this case falls within the first exception to the non-retroactivity rule. That is, the *Scarpone* decision determined that Appellee's primary conduct was beyond criminal sanction and, thus, he is entitled to benefit of that decision.

This exception to the non-retroactivity rule was fully explained in *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1171 (1971), wherein the Court first explained that nonretroactivity, as a general rule, applied to new " 'procedural due process' rules, that is, those applications of the constitution that forbid the government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior." *Id.* at 692, 91 S.Ct. at 1180. However, the *Williams* court explained,

> new "substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the Writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in

> freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

401 U.S. at 693, 91 S.Ct. at 1180 (footnotes omitted).

Mackey referred to that Court's earlier decision *United States v. United States Coin & Currency*, 401 U.S. 715, 91 S.Ct. 1041 (1971), in support of this quotation. In *United States Coin & Currency*, the Supreme Court ruled that its earlier decisions that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct could not constitutionally be held criminal.

Similarly here, Appellee's conduct, as admitted by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, to the extent that the Court determines that the *Scarpone* decision was a "new rule", the facts of this case fall within the first exception to the nonretroactivity principal.

VI. CONCLUSION

In the instant matter, a prisoner is being incarcerated, but without doubt not for the commission of the offense charged. As such, the Writ should be granted in order to remedy this aberrant and unjust situation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief Of Appellee was served this 5th day of August, 1997, upon the following by Federal Express.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-3288

WILLIAM FIORE

Appellee,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

APPELLEE'S PETITION FOR REHEARING

Appeal from the Order entered April 25, 1997, by the Honorable Gary L. Lancaster of the United States District Court, Western District of Pennsylvania, at D.C. NO. 96-CV-01231, granting petition for a writ of habeas corpus

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INTRODUCTION

The instant petition is brought pursuant to Federal Rules of Appellate Procedure 35 and 40 and Chapters 8 and 9 of the IOP of the court of Appeals for the Third Circuit, and respectfully requests a rehearing of the above-captioned matter either by the Panel or by this Court *en banc*. This case requires a second review as it involves a question of exceptional importance in that Appellee Fiore has been denied fundamental Due Process.

The requirement that the Commonwealth must prove each element of a crime charged beyond a reasonable doubt is so fundamental to American constitutional jurisprudence that it is often overlooked in the debate of other complicated statutory or constitutional issues. This case is a prime example of such egregious disregard of fundamental constitutional rights.

Appellee William Fiore was convicted of and sentenced on criminal charges of operating a hazardous waste facility without a permit when, in fact, he had a duly-issued permit from the Commonwealth of Pennsylvania. Moreover, his co-defendant and former employee David Scarpone, also convicted of the same offense, was later exonerated by the Supreme Court of Pennsylvania based on the conclusion that the Commonwealth had not proven each element of the crime. The Supreme Court explained:

> [T]o conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. . . . We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one [a permit]. Penal provisions of a statute must be strictly construed under 1 Pa.C.S. § 1928(b)(1).

Commonwealth v. Scarpone, 634 A.2d 1109, 1112 (Pa. 1993).

Petitioner Fiore is incarcerated on a conviction for which the Commonwealth failed to prove each essential

element of the crime, a clear violation of the Due Process Clause of the United States Constitution. Moreover, the blatant differential treatment afforded to Mr. Scarpone, is not justifiable under any analysis and, accordingly, constitutes a violation of the Equal Protection clause of the United States Constitution.

DISCUSSION

A. The Panel decision is erroneous as a matter of law in that it failed to afford deference to well-established principal that a conviction which is not based on proof beyond a reasonable doubt of each element of a crime violates the United States Constitution.

In *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at 1073.[1] The Court explained:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of

[1] Following *Winship*, the Court later logically ruled that claims of insufficiency of the evidence upon which to base a conviction are cognizable as a due process violation, and are reviewable by writ of habeas corpus. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2790 (1979).

> every fact necessary to constitute the crime with which he is charged.

Id. The statutory section under which Fiore was convicted reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . unless such person . . . has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department (of environmental resources].

35 P.S. § 6018.401(a). The Commonwealth does not dispute that Petitioner Fiore possessed a DER-authorized permit to operate his facility.

In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), a habeas corpus decision, the Supreme Court reversed a criminal defendant's conviction of homicide because the trial court had instructed the jury that the defendant carried the burden of proof by preponderance of the evidence that he acted in the heat of passion or sudden provocation to reduce the crime charged from murder to manslaughter. The Supreme Court ruled in this manner because the concept of "heat of passion or sudden provocation" negated, malice aforethought," which was an element of the definition of murder and, therefore, the Due Process Clause prohibited placing a burden of proof on the criminal defendant to negate an element of the crime. This Court determined that the state court had erred in refusing to apply *Winship* retroactively.

Thereafter, in *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339 (1977), the Supreme Court reversed a conviction for murder where the trial court instructed the

jury that the defendant carries the burden of proof "to your satisfaction" that he acted in self-defense. The defendant in *Hankerson* was tried prior to the Supreme court's decision in *Mullaney*. The court determined however that the burden of proof standard articulated in *Winship* and *Mullaney* was **applicable to all persons on direct appeal regardless of the date of trial.** The court reasoned that *Mullaney* did not announce a new law but rather was an application of *Winship*. The Court further noted:

> In *Ivan v. City of New York*, 407 U.S. 203, 204-205, 92 S.Ct. 1951 (1972), this Court addressed the question whether our decision in *In Re Winship*, [ ] holding the reasonable doubt standard applicable to state juvenile proceedings – was to be applied retroactively. The court there said:
>
> > For the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. [citations omitted].

Hankerson, 432 U.S. at 240, 97 S.Ct. at 2344.

With all due deference, Appellee Fiore suggests that the Panel asked the wrong question when it focused on

the retroactivity of the *Scarpone* decision rather than on the necessary applicability and prospectivity of *In Re Winship* and its progeny.

As the *Scarpone* decision holds, the Pennsylvania statute manifestly sets forth that the absence of a permit is a material element of the offense with which Mr. Fiore was charged and convicted. Moreover, Fiore consistently raised this issue throughout the course of his appeals and petitions in state court and by way of the instant Habeas Corpus Petition.[2] Because Mr. Fiore was tried after the decision in *Winship*, the Pennsylvania courts surely erred in failing to give him the benefit of the *Winship* decision

---

[2] Petitioner Fiore argued during his criminal trial and on direct appeal that the fact of his possession of a permit constituted an absolute defense to this crime. That is, the undisputed evidence was clearly insufficient to establish each element of the crime. And, in fact, that is exactly what the Pennsylvania Supreme Court ruled in *Scarpone*.

The Commonwealth admits that he raised and exhausted this issue on direct appeal. Thus, this Court may conclude its analysis at this point.

In its Brief on Appeal, the Commonwealth wrote:

> The issues raised by Fiore on direct appeal were as follows: . . . (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; . . .
>
> * * *
>
> Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim.

Appellant's Brief at 6-7

which holds that due process prevents his conviction absence proof by the Commonwealth beyond a reasonable doubt of *every element of the crime alleged.*

Petitioner respectfully suggests that the Panel's focus on whether or not *Scarpone* should have been retroactively applied was inaccurate in that *Scarpone* was not a new statement of the law but rather was a ruling based on Pennsylvania statutory law, including the rules of statutory construction which require that penal provisions of a statute must be strictly construed. 1 Pa. Cons. Stat. § 1928(b) (1).[3] The *Scarpone* decision recognizes that the Commonwealth failed to prove each element of the crime charged, a violation of due process.

The situation confronting the Court in this case is remarkably similar to that which it addressed in *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3rd Cir. 1978). In *Hickey*, the criminal defendant was convicted of carrying a firearm without a license. Following the denial of his appeals to the Superior and Supreme Courts of Pennsylvania, Hickey filed a federal habeas corpus petition wherein he contended that the Commonwealth had been unconstitutionally relieved of the burden of proving an essential element of the offense, that being the absence of a license to carry a firearm.

Hickey's trial and conviction occurred subsequent to *Winship*, but prior to the Pennsylvania Supreme Court's decision in *Commonwealth v. McNeil*, 337 A.2d 840 (Pa. 1975), wherein the Court clarified that absence of a

---

[3] As the Magistrate Judge accurately recognized, [sic]

license was an essential element of the crime and, pursuant to *Winship*, the Commonwealth carried the burden of establishing that fact. Pennsylvania appellate courts rejected Hickey's challenge to the unlicensed possession of firearms conviction because his trial took place before *McNeil* decision was issued, which the state courts concluded was prospective only.

Upon review of the habeas corpus petition, the Third Circuit Court of Appeals recognized that the Pennsylvania courts had erroneously focused on the retroactivity of *McNeil* rather than the prospective effect of *Winship*. Petitioner respectfully submits that the Panel of this Court has made the same error.

The Pennsylvania Supreme Court's decision in *Scarpone* was hardly a new statement of the criminal law of Pennsylvania, but rather was simply a ruling based on clear, unequivocable, and well established Pennsylvania law. Accordingly, Petitioner's request to the benefit of the *Scarpone* decision is not a request for retroactivity *per se*. Rather, Petitioner references the *Scarpone* decision as support for his consistently held position that the Commonwealth failed to prove each element of the crime of operating a hazardous waste facility without a permit and, accordingly, his conviction and incarceration for that crime violates due process.

Two distinguished Judges of this District have carefully reviewed the record in this matter and reached a conclusion diametrically opposed to that of the Panel herein. District Judge Gary Lancaster of the United States District For the Western District of Pennsylvania,

affirmed the Magistrate Judge's Report and Recommendation wherein Judge Caiazza stated:

> A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 1519 (1994). Accordingly, a conviction under section 606(f) is not valid unless the state satisfactorily establishes that the defendant is operating a waste site without a permit.

Report and Recommendation at 19.

Clearly, the Panel's decision in this matter should be reviewed on the basis of a fundamental breach of Due Process, wherein a decidedly innocent man who was not, could not, and cannot be proven guilty of every element of a crime has been convicted. Historically the writ of habeas corpus has been invoked to correct such injustices, and it should be available in the instant case as the District Court found.

B. Appellee Fiore's conviction constitutes a clear violation of Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws" (emphasis supplied)

As the Supreme Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v.*

Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 846 (1948). At bottom, the Equal Protection Clause guarantees that local, state and the federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications or treatments which lead to invidious discrimination. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S. Ct. 2941 (1979).

Not all government-made classifications are proscribed; nor are all government-made classifications reviewed under the same standard. Statutes which purposefully impair a fundamental right, such as the denial of one's freedom of movement, are subject to "strict scrutiny." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973). Under this standard of review, the government-made classification is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 2286 (1972).

Appellee William Fiore and his co-defendant David Scarpone are equally situated in all respects but for the manner by which their cases were appealed through the same state's court system. Scarpone has been exonerated by the Pennsylvania Supreme Court on all charges related to the charge of operating a hazardous waste facility

without a permit. Appellee Fiore, on the other hand, is unjustly incarcerated for precisely that offense. There is absolutely no rational basis for the courts' distinction between Mr. Scarpone and Mr. Fiore resulting in the freedom of one and the lengthy confinement of the other, much less an explanation which would pass the strict scrutiny analysis. The judicial failures to afford Mr. Fiore the same treatment afforded to Mr. Scarpone constitute a mockery of justice, most recently clothed in an incorrect retroactivity analysis. Moreover, this Court's novel linkage of Fiore's equal protection argument (which arises under the federal constitution) to retroactivity is not logically compelling; nor does it have any cognizable basis in statutory or case law.

The unjustified and unequal treatment of Mr. Fiore and Mr. Scarpone was soundly recognized in the Magistrate Judge's Report and Recommendation:

> The merits of this matter present uncommon circumstances: two intermediate appellate courts in Pennsylvania applied the same facts to the same statute and reached opposing conclusions. Based on the opinion of the Court of Common Pleas, the Superior Court concluded that Fiore was properly charged and convicted of operating a waste disposal facility without a permit under section 606(f) of the SWMA. Conversely, the Commonwealth Court determined that Scarpone, Fiore's codefendant, could not be convicted under section 606(f) because the DER had in fact issued a permit to operate the facility.
>
> Additionally, the Supreme Court [of Pennsylvania] was internally inconsistent with its

> respective rulings. In Fiore's appeal, it summarily affirmed the Superior Court by denying allocatur. However, the Supreme Court granted allocatur to Scarpone. It then affirmed the Commonwealth Court with the following analysis.
>
> > We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit.

Report and Recommendation at 14.

CONCLUSION

Appellee Fiore is currently incarcerated on the basis of a conviction which the Commonwealth obtained in violation of the Due Process Clause and the Equal Protection Clause of the United States Constitution. Justice demands that this Court affirm the District Court's Order granting Mr. Fiore relief.

The matters at issue go [sic] the very heart of American jurisprudence. Can an individual who is incontestably innocent of the crime charged nonetheless be punished severely because he is perceived as a "bad man" guilty of something else? Can a state capriciously confine one man and free another for the same noncriminal conduct? Is habeas corpus still the great writ or has it been watered past the point of effectiveness?

These are large questions for this or any court. They and the inconstant rulings by state and federal tribunals as well as the interests of justice militate in favor of a

thorough rehearing and definitive statement by the Court en banc.

Respectfully submitted,

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Local Appellate Rule 35.1 Statement

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional important, [sic] i.e., whether Appellee Fiore is incarcerated in violation of *Winship* and its progeny, which set forth that the Due Process Clause requires that an individual may not be convicted of a crime unless the Commonwealth proves each element of the crime beyond a reasonable doubt and that, in this case, the Commonwealth was improperly relieved of that Constitutional obligation. Moreover, if let stand, Appellee Fiore's conviction and incarceration on the charge of operating a hazardous waste facility without a permit constitutes a gross and indefensible breach of Equal Protection.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Petition for Rehearing was served this 3 day of August, 1998, upon the following by Federal Express.

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Supreme Court, U.S.
FILED
MAY 11 1999
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(5)

No. 98-942

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state can flout the Due Process Clause of the Fourteenth Amendment in order to deny federal habeas corpus relief to an incontestably innocent prisoner by claiming that an appellate decision constitutes "new law," when in fact the state did not and could not prove a key element of the offense charged?

2. Whether federal habeas relief should be extended to protect federal constitutional rights when a state refuses to retroactively apply a case which based its decision on the already existing clear language of the statute?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Third Circuit were as follows:

Appellants: Gregory White, *Warden of the State Correctional Institution at Pittsburgh*

The Attorney General of the Commonwealth of Pennsylvania

Appellee: William Fiore

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CITATIONS TO OPINIONS

The July 21, 1998 Judgment and Opinion of the United States Court of Appeals for the Third Circuit, which appears in the Appendix to the December 9, 1998 Petition for Writ of Certiorari, is reported at 149 F.3d 221 (1998) (No. 97-3288) (Pet. App. B[1] and Pet. App. A, respectively). No other federal court orders related to the petition for writ of habeas corpus are reported. The petition for rehearing of the July 21, 1998 decision was denied on September 23, 1998 (Pet. App. C). The July 21, 1998 Judgment and Opinion reversed the April 24, 1997 Memorandum Order, which adopted the February 27, 1997 Magistrate Judge's Report and Recommendation of the United States Court of Appeals for the Western District of Pennsylvania (No. 96-1231). The District Court's Order and the Magistrate Judge's Report also appear in the Appendix to the Petition for Writ of Certiorari (Pet. App. D and Pet. App. E, respectively).

Petitioner's April 10, 1987 Judgment of Sentence in the Court of Common Pleas, Criminal Division, Allegheny County, Pennsylvania is recorded at No. CC 8508740. It is unreported. The Superior Court of Pennsylvania's May 12, 1989 Memorandum Opinion affirming his judgment of sentence is unreported (No. 485 Pittsburgh

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[1] "Pet. App." denotes Appendices A-F, which were reproduced and attached to the Petition for Writ of Certiorari. Pursuant to Supreme Court Rule 26, these Appendices were not again reproduced in the Joint Appendix. As required, Appendices A-F are identified in the Joint Appendix's Table of Contents.

1988) (J.A. 98).[2] The *per curiam* affirmance is reported at 563 A.2d 189 (Pa. Super. 1989). Petitioner Fiore's petition to the Pennsylvania Supreme Court for allowance of appeal was denied in an unpublished order on March 13, 1990 at 575 A.2d 102 (Pa. 1990) (No. 310 W.D. Alloc. Dkt. 1989).

David Scarpone, co-defendant of Petitioner Fiore, was tried before the same court and the same jury as Petitioner Fiore (J.A. 6). Scarpone's convictions also are recorded at No. CC8508740. The August 5, 1991 reversal of Scarpone's conviction is published at *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991) (J.A. 104). On March 25, 1992, the Pennsylvania Supreme Court, in an unpublished order (without an opinion), denied Petitioner Fiore's application for extraordinary relief (No. 9 W.D. Misc. Dkt. 1992) to take jurisdiction over his case and consolidate it with the appeal of *Commonwealth v. Scarpone* to the Pennsylvania Supreme Court. The December 15, 1993 Pennsylvania Supreme Court Opinion affirming the Commonwealth Court's decision is reported at *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993) (J.A. 115). The March 22, 1994 Order of the Pennsylvania Supreme Court (No. 7 W.D. Misc. Dkt. 1994) denying Petitioner Fiore's second emergency application is also unreported.

The August 18, 1994 Findings of Fact and Conclusions of Law and Order of Court from the Allegheny

[2] "J.A." denotes the Joint Appendix, which was filed today along with Petitioner's Brief on the Merits.

County Court of Common Pleas (No. CC8508740) denying Petitioner Fiore's petition for post-conviction relief are unpublished. The Pennsylvania Superior Court's September 20, 1995 opinion affirming the trial court's August 18, 1994 Order is reported at 665 A.2d 1185 (Pa. Super. 1995) (J.A. 141). The Pennsylvania Supreme Court's April 19, 1996 denial of Petitioner Fiore's petition for allowance of appeal is reported at 675 A.2d 1243 (Pa. 1996).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

On July 21, 1998 the Court of Appeals reversed a District Court order granting a petition for writ of habeas corpus (Pet. App. A to Pet. App. B and Pet. App. D to Pet. App. E). Petitioner timely filed a petition for rehearing requesting rehearing and/or rehearing *en banc*. The petition was denied by the Court of Appeals on September 23, 1998 (Pet. App. C).

On December 9, 1998, Petitioner timely filed a Petition for Writ of Certiorari. On March 29, 1999 this Court granted the Petition to review the first and third questions.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

From the time of his conviction, Petitioner Fiore has been denied due process of law as guaranteed by the

Fourteenth Amendment to the United States Constitution in that he is incarcerated for a crime based on evidence which indisputably does not support each essential element of the offense charged.

1. ***United States Constitution, Amendment XIV, § 1***:

   "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. ***Habeas Corpus,***
   28 U.S.C. § 2243:

   "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

   The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

   The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

   When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

   Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

   The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

   The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

   The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

3. ***Habeas Corpus,***
   28 U.S.C. § 2254(a):

   "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

4. ***Rules of Strict and Liberal***
   Construction, 1 Pa. C.S.A. § 1928(b)(1):

   "(b) All provisions of a statute of the classes hereafter enumerated shall be strictly construed:

   (1) Penal provisions."

5. ***Crimes Code,***
   18 Pa. C.S.A. § 107(b):

   "(b) Common law crimes abolished – No conduct constitutes a crime unless it is a crime under this title or another statute of this Commonwealth."

6. ***Solid Waste Management Act, ("SWMA"), 35 P.S. § 6018.401(a)***:

> "(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment or disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department."

7. ***Solid Waste Management Act, ("SWMA"), 35 P.S. § 6018.606(f)***:

> "(f) Any person who stores, transports, treats, or disposes of hazardous waste within the Commonwealth in violation of section 401, or in violation of any order of the department shall be guilty of a felony of the second degree and, upon conviction, shall be sentenced to pay a fine of not less than $2,500 but not more than $100,000 per day for each violation or to imprisonment for not less than two years but not more than ten years, or both." [footnote omitted]

CONCISE STATEMENT OF THE CASE

The relevant facts presented are not in dispute. William Fiore owned and operated a hazardous waste facility in western Pennsylvania under permit from the state's

Department of Environmental Resources ("DER")[3] (Pet. App. A-3). The DER did not dispute that Petitioner had obtained a permit for this facility. Fiore and the facility's general manager, David Scarpone, were charged with various criminal counts, including the operation of a hazardous waste disposal facility without a permit in violation of Pennsylvania's Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony (Pet. App. A-3 and Pet. App. E-2 to E-4).

The essence of the felony charge against Petitioner and Mr. Scarpone was that they criminally operated a hazardous waste facility without obtaining a permit (Pet. App. E-3 to E-4).[4]

It is undisputed that Petitioner Fiore and his employee Scarpone *had* a DER permit to operate the facility (J.A. 180). At trial the Commonwealth argued that because they operated the facility contrary to the parameters of the DER permit, the permit became "null" and, effectively, nonexistent (Pet. App. A-3).

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revocate or suspend that permit, or must it be worded so in the permit?" (J.A. 128).

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Petitioner's counsel suggested that the proper answer to both parts of the jury's

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[3] Subsequently, the agency's name was changed to the Pennsylvania Department of Environmental Protection.

[4] *See also, Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (J.A. 121).

question was "no," because under the SWMA regulations no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal such revocations, suspension or modification to Pennsylvania's Environmental Hearing Board. The Court incorrectly instructed the jury that if Petitioner's conduct was sufficiently egregious and outside the parameters of the permit, the permit was effectively revoked (J.A. 178-180).

Thereafter, the jury returned guilty verdicts as to Petitioner and Scarpone. Both appealed their respective judgments of sentence imposed by the Court of Common Pleas. Fiore appealed to the Superior Court of Pennsylvania; Scarpone to the Commonwealth Court of Pennsylvania.[5] The Superior Court *sua sponte* transferred Fiore's appeal to the Commonwealth Court. Upon Fiore's motion, his appeal was subsequently transferred back to the Superior Court (J.A. 128, J.A. 181).

The Superior Court affirmed his conviction. The Pennsylvania Supreme Court then denied Fiore's petition for allowance of appeal. *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989) (table), *alloc. denied*, 575 A.2d 1185 (Pa. 1990); (*see also* Pet. App. E-5 to E-6 and J.A. 98).

Scarpone's appeal was decided by the Pennsylvania Commonwealth Court. In *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd*, *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993) (J.A. 104 and J.A. 115), the court held that since Petitioner had a permit to operate

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[5] The Commonwealth Court and the Superior Court are intermediate appellate courts in Pennsylvania (*see* Pet. App. E-5 n.2 and E-11).

the facility, his employee, Scarpone, could not be convicted of operating *without a permit*. Scarpone's conviction was reversed. *Id.*; (Pet. App. E-7 and J.A. 114).

The Pennsylvania Supreme Court granted the Respondent's petition to review the Commonwealth Court's decision in *Scarpone* (Pet. App. E-7 and J.A. 115). Meanwhile, Fiore petitioned the Pennsylvania Supreme Court by emergency application (No. 9 W.D. Misc. Dkt. 1992) to reconsider his conviction in conjunction with its review of *Scarpone*. The Pennsylvania Supreme Court denied the emergency application (Pet. App. E-7).

The Pennsylvania Supreme Court recognized the identity of the situations in *Scarpone* and *Fiore*. Its opinion affirmed the Commonwealth Court's reversal of Scarpone's conviction:

> We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Commonwealth v. Scarpone, 634 A.2d at 1112 (J.A. 121). The state's highest court concluded:

> The alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility **without a permit** is a bald fiction we cannot endorse.

Scarpone, 634 A.2d at 1112 (emphasis in original) (J.A. 122).

Thereafter Petitioner Fiore filed another emergency application with the Pennsylvania Supreme Court (No. 7

W.D. Misc. Dkt. 1994) requesting it to reverse the stark inequity of his conviction. The application was denied (Pet. App. E-8).

Petitioner then filed a motion for post-conviction collateral relief (Pet. App. E-8 and J.A. 124). The trial court denied the motion (J.A. 141). Its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995), *alloc. denied*, 675 A.2d 1243 (Pa. 1996) (J.A. 141).

On July 3, 1996, Petitioner Fiore filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania (No. 96-1231). The petition raised two essential issues:

1. Whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged.
2. Whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal protection rights by refusing to grant him the benefit of the Pennsylvania Supreme Court's decision in *Scarpone*.

(J.A. 166-167 and Pet. App. E-9 to E-10). In a report issued on February 27, 1997, United States Magistrate Judge Francis X. Caiazza recommended that the writ be granted (Pet. App. E-1). On April 21, 1997 United States District Court Judge Gary L. Lancaster adopted the Magistrate's Report and Recommendation (Pet. App. D-1 to D-2). The District Court further ordered that Fiore be released from the part of his incarceration that stemmed from his convictions under 35 P.S. § 6018.401(a) and § 6108.606(f) (Pet. App. D-2). The District Court's decision was based, in part, on the fact that Fiore's conviction was affirmed

while his co-defendant's was reversed on the same factual issue – whether a permit existed (Pet. App. E-12, E-17 to E-18).

On July 21, 1998 the United States Court of Appeals for the Third Circuit reversed the District Court (Pet. App. A. and Pet. App. B). A petition for rehearing was denied (Pet. App. C). Petitioner Fiore remains incarcerated in the State Correctional Institute at Pittsburgh, Pennsylvania for committing acts which never were criminal under the penal provisions charged.

On December 9, 1998, Fiore filed a Petition for Writ of Certiorari, which presented three questions for review. On March 29, 1999, this Court granted Certiorari to review Questions 1 and 3.

SUMMARY OF THE ARGUMENT

Petitioner William Fiore owned and operated a hazardous waste facility under permit from the State's Department of Environmental Resources. He and his general manager/co-defendant David Scarpone were charged and convicted for operating a hazardous waste facility without a permit.

On appeal, the Pennsylvania Superior Court upheld Petitioner Fiore's conviction, and the Pennsylvania Supreme Court refused to review it. However the Pennsylvania Commonwealth Court, on the same facts, reversed co-defendant Scarpone's conviction, and its reversal was affirmed by the Pennsylvania Supreme Court. In *Scarpone*, the courts held that the government

could not prove every element of the crime because a permit existed. The two conflicting decisions on the same facts are impossible to reconcile.

The Due Process Clause of the federal Constitution requires the government to prove each element of the crime beyond a reasonable doubt. In *Fiore* an individual was convicted when the government could not prove the elements of the offense charged. Petitioner is not relying upon retroactive application of the *Scarpone* decision. Rather, he cites the *Scarpone* decision to support his claim of innocence and that he is incarcerated in violation of his due process rights. This Court should reverse the Court of Appeals and grant Petitioner Fiore habeas relief. Such relief is proper because an innocent man remains incarcerated in defiance of due process.

The Court of Appeals for the Third Circuit erred in failing to apply the Pennsylvania Supreme Court's ruling in *Scarpone* to the facts and circumstances of Petitioner's case. It likewise erred in determining that the retroactive application of *Scarpone* was disallowed by decisions of this Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not state a "new rule of law" and therefore its retroactive application is not forbidden by *Teague v. Lane* or any other decision of this Court. Rather, *Scarpone* was based on well-established, preexisting rules of constitutional and statutory law.

The petition for writ of habeas corpus is based on constitutional principles which unquestionably were in effect at the time of Petitioner's trial, and before his conviction became final. His conviction breached due

process in that the Commonwealth failed to prove an essential element of the crime charged.

Assuming arguendo that the proscriptions in *Teague v. Lane* apply, the facts of this case fall within a well established exception against retroactive application of new rules of law. When a new rule of law places certain kinds of primary conduct beyond the power of criminal lawmaking authority to prohibit, the new rule may be applied retroactively. It is undisputed that Petitioner Fiore's conduct is not proscribed by the Pennsylvania statute upon which his anomalous conviction stands.

The facts herein present a quintessential case of the incarceration of an innocent man. This Court consistently has determined that the equitable purpose of the writ will be applied, despite procedural errors or other factors which weigh in favor of the state's interest in finality, if the Petitioner makes a "colorable" showing of innocence. Petitioner Fiore unquestionably is innocent of the crime charged. The failure of this Court to use its equitable authority to give him the benefit of the law and facts would constitute a continuation of this unusual miscarriage of justice.

ARGUMENT

An Indisputably Innocent Man Remains Incarcerated For A Crime The Commonwealth Concedes That It Could Not Prove. This Court Should Correct The Continuing Miscarriage Of Justice That Occurred When The Court Of Appeals Reversed The District Court's Grant Of Federal Habeas Relief.

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a). This Court must "dispose of the matter as law and justice require." 28 U.S.C. § 2243.

As early as 1970, Justice Brennan writing for the majority recognized that:

> [a] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

In Re Winship, 397 U.S. 358, 363-364 (1970).

Petitioner Fiore is actually innocent of the crime which is the basis of his incarceration. His incarceration runs afoul of the federal Constitution and this Court's clearly established precedent in that the Fourteenth Amendment of the United States Constitution prohibits incarcerating a person when the Respondent Commonwealth could not and cannot prove each element of the crime charged.

A. IN VIOLATION OF THE DUE PROCESS CLAUSE, PETITIONER FIORE WAS CONVICTED, SENTENCED AND INCARCERATED ON THE BASIS OF FACTS WHICH DID NOT ESTABLISH EACH ELEMENT OF THE CRIME CHARGED.

The cornerstone of the American criminal justice system is that defendants are "presumed innocent" and can be convicted only if the government proves each element of the crime **charged** "beyond a reasonable doubt." This presumption has been referred to as the "golden thread" that runs throughout our criminal justice system.[6] The conviction, sentencing and continued incarceration of Petitioner Fiore defies this fundamental principle of law and threatens to snarl this golden thread.

The question before this Court is whether or not the Due Process Clause is violated when an individual is convicted, sentenced and incarcerated for a crime the government could not prove.

Petitioner Fiore was imprisoned on the basis of facts that never constituted a crime under the section of the penal code charged. After years of result-oriented decisions on the part of the Pennsylvania court system, the United States District Court for the Western District of Pennsylvania finally recognized this constitutional deprivation and properly granted the writ of habeas corpus (Pet. App. D-1 to D-2, E-1, E-17 to E-18). In reversing this decision, the United States Court of Appeals for the Third

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[6] S. Sundby, *"The Reasonable Doubt Rule and the Meaning of Innocence,"* 40 Hasting L.J. 457 (1989), quoting A. Cross, *The Golden Thread of the Criminal Law* 2 (1976).

Circuit regrettably stripped Petitioner Fiore of his elemental rights and rejected his constitutional claims (Pet. App. A – Pet. App. B and Pet. App. C).

Petitioner Fiore is incarcerated for a crime he is factually and legally innocent of committing. Therefore, the Due Process Clause is violated. Petitioner Fiore submits his case to this Court of last resort so that a fundamental protection of the federal Constitution and our criminal justice system can be given meaning again.

1. Petitioner Fiore Is Innocent.

The statutory section under which Petitioner Fiore was convicted, sentenced and incarcerated reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . **unless such person . . . has first obtained a permit for the storage,** treatment and disposal of hazardous waste from the department [of environmental resources].

35 P.S. § 6018.401(a) (emphasis added). The pivotal element of this offense is the requirement that a person obtain a permit. The Respondent Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times (Pet. App. A-3 and Pet. App. E-2 to E-4).

Petitioner argued during his criminal trial and on direct appeal that his possession of a permit constituted an absolute defense to this crime (Pet. App. E-4 to E-9). In fact, that is precisely what the Pennsylvania Supreme

Court ruled in *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (J.A. 121). Petitioner is not insisting that *Scarpone* be applied to his case. To the contrary, Fiore is requesting that he be given the same due process protections that have been afforded to criminal defendants since *Winship*.

2. The Guarantees Of The Due Process Clause Require Proof Beyond A Reasonable Doubt Of Every Element Of The Offense.

The Due Process Clause of the federal Constitution requires the Commonwealth of Pennsylvania to prove each element of the offense charged, including the failure to obtain a DER permit, beyond a reasonable doubt. *E.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *Patterson v. New York*, 432 U.S. 197 (1977); *Leland v. Oregon*, 343 U.S. 790 (1952). In order to convict a defendant, the Due Process Clause of the Fourteenth Amendment requires "proof beyond a reasonable doubt of **every** fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364 (emphasis added); *Scarpone*, 634 A.2d at 1112 (J.A. 121). As this Court reasoned as early as 1960:

> Just as "conviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt.

Thompson v. Louisville, 362 U.S. 199, 206 (1960) (internal footnotes omitted).

As Justice Kennedy recently reaffirmed in a dissenting opinion:

> Criminal laws proscribe certain conduct and specify punishment for transgressions. A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements. As a general rule, each element of a charged crime must be set forth in an indictment, *Hamling v. United States*, 418 U.S. 87, 117 [ ] (1974), and established by the government by proof beyond a reasonable doubt, *In re Winship*, 397 U.S. [at] 364. . . .

Jones v. United States, ___ U.S. ___, 119 S.Ct. 1215, 1230 (1999) (dissent based upon other grounds).

The conviction violates the constitutional guarantees set forth in *Winship, supra,* and its progeny because the government did not meet its burden of proof as to the pivotal element of the offense – the failure to obtain a DER permit. Petitioner has stated a cognizable federal constitutional claim, because the evidence in support of his state conviction cannot be fairly characterized as sufficient to lead a rational trier of fact to find him guilty beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 321 (1979).[7] These constitutional requirements underscored the Pennsylvania Supreme Court's decision in *Scarpone*. *Thompson* predates Petitioner's conviction by over 25 years; *Winship* predates Petitioner's conviction by over 15 years. Since his trial Petitioner Fiore has simply been seeking that these well established due process

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[7] *Jackson* lowered the *Thompson, supra,* standard that the conviction must be "totally devoid of evidentiary support." *Thompson,* 362 U.S. at 199. Petitioner submits that even under the more stringent *Thompson* standard, his incarceration is unconstitutional based upon the facts in evidence.

guarantees be applied to his case. Therefore, Fiore is not relying upon retroactive application of the law to his case. To label his federal habeas petition otherwise undermines the guarantees of the Fourteenth Amendment.

As this Court reasoned in *United States v. Johnson*, 457 U.S. 537 (1982), "application of clear pre-existing" constitutional rules, such as Fourth Amendment guidelines, "raise no real questions of retroactivity at all." *Id.* at 560. Therefore, contrary to the Court of Appeals' decision, Petitioner Fiore is not simply seeking retroactive application of the law. Rather, his habeas petition relies upon the argument that baseline federal constitutional protections that were obtained before, during, and after his case should apply to his incarceration. He implores this Court not to deviate from its well established due process requirements for convicting and incarcerating an individual.

This Court's precedent holds that Petitioner Fiore cannot be detained, if the trial court lacked authority to punish him in the first place. This cornerstone of the American criminal justice system remains firmly planted despite technical procedural matters such as putative nonretroactivity. *See Johnson*, 457 U.S. at 550, *citing United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) and *Robinson v. Neil*, 409 U.S. 505, 509 (1975). *See also, infra,* Section B. The trial court had no authority to incarcerate Petitioner because Respondent could not prove each element of the offense charged.

The litmus test of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 559 (1974), *citing Dent v.*

West Virginia, 129 U.S. 114, 123 (1889). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The law "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976). Contrary to Respondent's assertions, the Petitioner had *no* notice that he could have been violating the statute in question because he possessed a permit. *Accord*, *Scarpone*, 634 A.2d at 1112 (J.A. 121). To charge otherwise is a clear due process violation because Petitioner had no notice that having a permit still could expose him to liability.

Case law supports Petitioner's contention that he has been denied due process by the Pennsylvania court system and the Court of Appeals. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), that Court faced a factual situation similar to the one at bar. On a writ of *coram nobis*, it was asked to apply retroactively a United States Supreme Court decision to a prior conviction. In deciding to grant the writ, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971) and determined that its decision was based on "the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law." *Travers*, 514 F.2d at 1175, *quoting*

Liguori, 438 F.2d at 669. This is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Id.*

In *Davis v. United States*, 417 U.S. 333 (1974), the Court stated that if the habeas petitioner's contentions were true that his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346. Collateral relief is necessary to correct a "fundamental" defect in the sentencing and incarceration of an innocent person. *Id.*

The *Davis* Court concluded:

> In this case, the petitioner's contention is that [an earlier decision] establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

417 U.S. at 346-47 (internal citations omitted).

As in *Davis*, Petitioner Fiore is incarcerated for actions that are not criminal, as determined by the explicit language of the statute and as recognized by the highest court of Pennsylvania. The Pennsylvania courts

failed to apply the basic due process principles discussed above. This Court now has the opportunity to cure this fundamental defect. Moreover, in the past this Court has demonstrated that it is important to use the writ of habeas corpus to ensure that innocent people are not incarcerated. *See, e.g., O'Neal v. McAninch*, 513 U.S. 432, 441 (1995) (" . . . the basic purposes underlying the writ of habeas corpus [is to address] . . . error of constitutional dimension – the sort that risks an unreliable trial outcome and the consequent conviction of an innocent man.")

Petitioner Fiore has a liberty interest in his freedom. This Court has reasoned in the past that the government is required to prove each element of the crime charged beyond a reasonable doubt to protect this interest. This is a classic situation in which habeas relief must be invoked to prohibit the incarceration of an innocent man. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's right to due process of the law.

3. Federal Habeas Relief Should Be Granted For Due Process Violations.

Following *Winship's* logic, this Court has taught that claims of insufficiency of the evidence upon which to base a conviction are cognizable as due process violations reviewable by writ of habeas corpus. *Jackson*, 443 U.S. at 319.

In assessing challenges to the sufficiency of the evidence, the question for habeas courts is not whether there was any evidence to support a conviction, but " 'whether, after reviewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.' " *Wright v. West*, 505 U.S. 277, 284 (1992), *quoting Jackson*, 443 U.S. at 319. Petitioner was convicted on the basis of not having a DER permit. He clearly had a permit at all relevant times. No rational trier of fact could conclude otherwise. In *Scarpone*, the Pennsylvania appellate courts effectively recognized this constitutional deprivation when they held that Scarpone was an innocent man due to the existence of a DER permit. *Id.* at 1112 (J.A. 121).

4. The District Court Properly Determined That Petitioner Fiore's Constitutional Rights Are Being Violated By His Incarceration For A Crime He Could Not Have Committed.

The District Court properly gave weight to the *Scarpone* courts' recognition that Petitioner and Scarpone were innocent and that Petitioner's incarceration is an "egregious injustice because it represents a deprivation of Fiore's liberty interests" (Pet. App. E-16). The Pennsylvania Supreme Court noted the identities of the situations in *Scarpone* and *Fiore* when it held:

> We find that the Commonwealth did not make out the crime of operating a waste disposal facility **without a permit** against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Scarpone, 634 A.2d at 1112 (emphasis added) (J.A. 121).

The Court of Appeals rationalized its reversal of the grant of habeas by ignoring the due process issue. It erred in framing its analysis of Petitioner's due process claim as simply a request that Petitioner be afforded retroactive application of the Pennsylvania Supreme Court's decision in *Scarpone*. Rather, Petitioner's due process claim is a straightforward contention that the trial court had no authority to punish him because the uncontradicted evidence of record does not establish each essential element of the crime beyond a reasonable doubt. Fiore is legally innocent of violating the crime he was convicted of committing. Therefore, it is illegal to keep him incarcerated.

As is discussed below in Section B, the Court of Appeals focused exclusively on the retroactivity issue. The appellate decision ignored a fundamental principle of constitutional law. A state court conviction violates the Due Process Clause when the government can not prove each element of the offense "beyond a reasonable doubt." *Winship*, 397 U.S. at 364. Even when the evidence is viewed in the light most favorable to the Respondent, the continued incarceration of Petitioner Fiore is unconstitutional. *Jackson*, 443 U.S. at 319. Petitioner Fiore is not relying upon the benefit of a new law. He is seeking the vindication of a clearly established constitutional doctrine.

5. The Deprivation Of Petitioner Fiore's Due Process Rights Warrants Reversal By This Court.

Every day that Petitioner Fiore remains imprisoned, a fundamental breach of due process occurs. An innocent

man who was not, could not and cannot be proven guilty of every element of the crime has been convicted.

Respondent effectively concedes that it has no legitimate response to Petitioner Fiore's due process allegations. Like the Court of Appeals, Respondent focused on the retroactivity argument and ignored Petitioner's constitutional claims. It failed to address this argument. In its Brief in Opposition to the Petition for Writ of Certiorari at pages 4-6, Respondent argues in slightly more than two pages that Petitioner's due process claim is barred because it is a request for retroactive application of the law. This is the case because the Respondent inherently recognizes that there is no legitimate argument to support the continued incarceration of an innocent man.

Petitioner Fiore's petition for writ of habeas corpus simply requested that the longstanding constitutional principle that the Due Process Clause requires proof of every element of the crime be applied to his case. The District Court correctly granted the writ to correct this grave injustice. The Court of Appeals erroneously ignored this issue and perpetuated the miscarriage of justice.

B. THE COURT OF APPEALS MISPERCEIVED RETROACTIVITY.

The second question presented relates to the grounds upon which the Court of Appeals rationalized the reversal of the grant of habeas relief and involves the applicability of the principle of nonretroactivity. That principle prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced

after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), *citing Stringer v. Black*, 503 U.S. 222 (1992).

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court clarified how the question of retroactivity should be resolved for cases on collateral review, holding that *new* rules of law should not be applied retroactively on collateral review. *Id.* at 310.

Here the Court of Appeals reversed the District Court's grant of habeas relief by straining to characterize the relief sought as a violation of the prohibition against retroactively applying a new rule of law (Pet. App. A-2).

1. The *Scarpone* Decision Did Not State A "New Rule Of Law," And Therefore The *Teague* Restrictions Do Not Apply.

The Court of Appeals' error lies in its characterization of the Pennsylvania Supreme Court's *Scarpone, supra*, decision as a "new rule of law."

In *Commonwealth v. Blystone*, 725 A.2d 1197 (Pa. 1999), the Pennsylvania Supreme Court indicated its adoption of *Teague's* guidance on the retroactive application of new rules of law.

> In *Teague v. Lane*, [ ] the United States Supreme Court barred the retroactive application upon collateral review of a new constitutional rule of criminal procedure that is announced after a defendant's conviction is final, because all avenues of direct appeal have been exhausted. The Teague Court held that a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government, or if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Id. at 1202-1203 (footnote and citation omitted).

Scarpone did not create a new rule of law. The state appellate courts simply held that the evidence did not support a conviction because the uncontroverted facts established that then-defendant Scarpone **had** a DER permit. Thus, the Commonwealth had failed to establish one essential element of the offense. The Court did not accord the Commonwealth's contorted argument to the contrary with a substantive discussion. Rather, the Court simply stated that the Commonwealth's position, adopted by the Superior Court of Pennsylvania, was a "bald fiction we cannot endorse." *Id.* at 1112 (J.A. 122). A DER permit existed. Petitioner and his co-defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. Petitioner Fiore is simply seeking consistency on the basis of the same facts.

The succinct *Scarpone* opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, its decision is based on the simple principle that penal statutes must be strictly construed so as to provide clear notice of what conduct is illegal, 1 Pa. C.S.A. § 1928(b)(1),[7] and on the corresponding Constitutional

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[7] The strict construction requirement of penal statutes is based on constitutional due process protections. "The rationale behind strict construction of a penal statute is the injustice of convicting a person without clear notice to him that his contemplated conduct is unlawful[.]" *Commonwealth v.*

mandate that due process requires the government to prove each element of the offense charged beyond a reasonable doubt. *Winship*, 397 U.S. at 364. The *Scarpone* decision does not revise or reverse previous case law, nor has the Commonwealth raised such an argument. The statute in question was clear on its face. One of the elements was the failure to obtain a permit. *See* 35 P.S. § 6018.401(a).

A review of Pennsylvania case law reveals no decisions upon which the Commonwealth reasonably could have relied in prosecuting Petitioner under its interpretation of the law. On the contrary, all extant precedent militated in favor of not indicting much less convicting in the absence of a full complement of the statutory elements of the offense.

Judicial construction of a statute is an "authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (footnote omitted). *Scarpone, supra,* simply stated the parameters of the penal statute; it did not change or alter those parameters; it did not clarify an ambiguity; it did not create a "new rule" of either procedural or substantive law.

Broughton, 390 A.2d 1282, 1286 (Pa. 1978). *See also, Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976). *Accord, In re Suspension of DeMarco*, 414 A.2d 1339 (N.J. 1980) (at the heart of the rule requiring strict construction is the principle of due process). Moreover, strict construction of penal statutes has been required in Pennsylvania long before the enactment of that statutory requirement. *Accord, In re Laub*, 21 A.2d 575, 581 (Pa. 1941).

2. Petitioner Fiore Raised A Constitutional Due Process Challenge To The Pennsylvania Courts' Failure To Require The Commonwealth To Prove Each Element Of The Crime Charged.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather interpreted an unambiguous statute and applied established constitutional principles.

In *Scarpone*, the Court was not required to interpret an ambiguous term or phrase or to apply a legislative intent analysis. Rather, it concluded that due process had been violated because the Commonwealth had not proven each essential element of the offense charged. *Id.* at 1112 (J.A. 121). This construction is supported by prior decisions of this Court.

In *Bailey v. United States*, 516 U.S. 137 (1995), in a direct appeal, this Court interpreted the term "use" in a penal statute. The Court rejected the lower court's adoption of a "proximity and accessibility" test to determine if a defendant had "use" of a gun, and applied a plainer meaning to the term in determining that "use" denotes "active employment."

Subsequently, in *Bousley v. United States*, 523 U.S. 614, ___, 118 S.Ct. 1604, 1610 (1998), this Court held that the *Teague* rules on retroactivity did *not* apply to retroactive application of *Bailey* because the constitutional claim challenged Bousley's guilty plea as not "knowing and intelligent." The issue raised was whether a guilty plea could survive when both the prosecuting and defending attorneys, as well as the defendant, misunderstood the statutory meaning of the term "use" while entering into

the plea. *Id.* at 1608-1609. The court supported its determination that *Bailey* should be applied retroactively with the conclusion that there is "nothing new" about the principle that a guilty plea must be knowing and intelligent. *Id.* at 1618.

Like the petitioner in *Bousley*, Fiore argues a fundamental constitutional principle – that due process is violated when the Commonwealth fails to prove each element of the offense charged. *See, infra,* Section A.

In *Bousley*, this Court explained the important difference between substance and procedure in the habeas context:

> The Teague doctrine is founded on the notion that one of the "principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.' " Teague, 489 U.S., at 312, 109 S.Ct., at 1076 (quoting Desist v. United States, 394 U.S. 244, 262, 89 S.Ct. 1030, 1040-1041, 22 L.Ed.2d 248 (1969)). Consequently, unless a new rule of criminal procedure is of such a nature that "without [it] the likelihood of an accurate conviction is seriously diminished," 489 U.S., at 313, 109 S.Ct., at 1077, there is no reason to apply the rule retroactively on habeas review. By contrast, decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct " 'beyond the power of the criminal law-making authority to proscribe,' " id., at 311, 109 S.Ct., at 1075 (quoting Mackey, 401 U.S., at 692, 91 S.Ct., at 1164), necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal."

> Davis v. United States, 417 U.S. 333, 346, 94 S.Ct. 2298, 2305, 41 L.Ed.2d 109 (1974). For under our federal system it is only Congress, and not the courts, which can make conduct criminal. United States v. Lanier, 520 U.S. 259, ___, n.6, 117 S.Ct. 1219, 1226, 137 L.Ed.2d 432 (1997)[.]

Id. at 1610. This Court's decision in *Bousley* is on all fours with the facts of the instant case. In Pennsylvania, only the legislature can make conduct criminal. An executive agency cannot create a fictional version of criminal conduct and urge it on the court.

Bousley stands for the proposition that even if *Bailey* announced only a new statutory construction and not a rule of constitutional law, a post conviction challenge based on *Bailey* may raise a constitutional claim. *Bousley,* 118 S.Ct. at 1610.

For example, in *United States v. Gobert*, 139 F.3d 436 (5th Cir. 1998), the petitioner collaterally challenged his sentence based on *Bailey*. In reversing the district court, the *Gobert* court explained:

> Even though *Bailey* itself is a statutory, non-constitutional case, it does not necessarily follow that a prisoner's post-*Bailey* petition for collateral relief sounds in statutory, non-constitutional law. We conclude, in fact, that the claim falls squarely within the ambit of the Fifth Amendment. Indeed, the well-settled case law of this and other courts compels such a conclusion. We have stated that if a defendant has been convicted of a criminal act that becomes no longer criminal, such a conviction cannot stand. After all, a refusal to vacate a sentence where a change in the substantive law has placed the

conduct for which the defendant was convicted beyond the scope of a criminal statute would result in a complete miscarriage of justice. Our sister circuits have held that a fundamental defect resulting in a complete miscarriage of justice is tantamount to a violation of the Due Process Clause of the Fifth Amendment. As we stated earlier, James Gobert maintains that he was convicted and imprisoned for engaging in conduct that the Supreme Court has since deemed non-criminal. If he is correct, our refusal to vacate his sentence would result in a complete miscarriage of justice; such a result would offend the Due Process Clause of the Fifth Amendment. The foregoing authorities make it clear to us that James Gobert has made a substantial showing of the denial of his constitutional rights to due process, notwithstanding that *Bailey* announced merely a new statutory interpretation. Accordingly, we issue a COA and advance to the merits of his claim.

Id. at 438-439 (footnotes omitted).

3. The Third Circuit Erred In Its Failure To Follow This Court's Lead In *Bousley v. United States*.

Petitioner submits that the Court of Appeals' rationale for not following the *Bousley* reasoning is not persuasive.[8] Whether or not the *Bousley* Court relied on the

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[8] The Court of Appeals stated, without explanation, "Because the *Bousley* decision rested on the Supreme Court's understanding of the balance of power in the federal system, it differs critically from the current case, which involves a state court's refusal to give retroactive effect to a judicial interpretation of a state statute." *Fiore v. White, et al.*, 149 F.3d 221, 226 n.4 (3d Cir. 1998) (Pet. App. A-12).

"balance of power in the federal system," is a distinction without a difference, as the state balance of power between the judiciary and legislative branches is essentially the same as in the federal system.

In Pennsylvania, it is fundamentally accepted that only the state legislature has the power to define criminal offenses and to determine the punishments to be imposed. *Sullivan v. Commonwealth, Dept. of Transportation*, 682 A.2d 5, 8 (Pa. Commw. 1996), *alloc. granted*, 689 A.2d 237 (Pa. 1997); *Commonwealth v. Wacherer*, 41 A.2d 574 (Pa. 1945). Any common law crimes which prohibit the same conduct proscribed by statutory law are abolished. *See* 18 Pa. C.S.A. § 107(b); *Commonwealth v. Bellis*, 440 A.2d 1179 (Pa. 1982). There is no question that the conviction upon which Fiore's petition is based was not a common law crime. And, therefore, the relevant balance of power between the state's legislative and judicial branches does not differ from that in the federal system.

In *McNally v. United States*, 483 U.S. 350 (1987), this Court considered the scope of the mail fraud statute, which prohibits the use of the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." It ruled that the statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government. *Id.* at 359-360.

Subsequent to the *McNally* decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett*, (No. 87-C-8978 (85-CR-284) N.D. Ill. 1988) (Pet. App. F), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of the petition was this Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals (Pet. App. F-1).

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a manner consistent with the terms of the statute (Pet. App. F-8 to F-10).

Other courts collaterally have set aside mail fraud convictions, based on *McNally*. *See United States v. Mandel*, 672 F.Supp. 864, 875 n.5 (D. Md. 1987), *aff'd*, 862 F.2d 1067 (4th Cir. 1988). The *Mandel* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos*:

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may be subjected to punishment for crime in the

> federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck* [*v. United States*], 318 U.S. [236] at 243 [1943], "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners' conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

Mandel, 672 F.Supp. at 873-874 (citations omitted).

The general rule against the retroactive effect of a "new" statement of law ordinarily involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966). As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are applied retroactively only if they affect the truth-finding process. Here, however, as the District Court aptly noted, the Pennsylvania Supreme Court's ruling in *Scarpone* simply decided which of the two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct and, critically, the actual elements of the offense (Pet. App. E-11 to E-12; Pet. App. E-14 to E-15).

The Court of Appeals' reliance on *Martin v. Warden, Huntingdon State Correctional Institution*, 653 F.2d 799 (3d Cir. 1981) to deny "retroactive" application of *Scarpone* is misplaced. In *Martin*, which preceded both *Bailey* and *Bousley*, the Court of Appeals on collateral review of a state court conviction refused retroactively to apply *Commonwealth v. Waters*, 418 A.2d 312 (Pa. 1980). In *Waters*, the Pennsylvania Supreme Court revised the then-existing state law of felony-murder. The *Waters* decision clearly created **new law**, which would not be applied retroactively to collateral appeals, and the opinion plainly states that the Commonwealth's trial position was supported by existing case law. Moreover, the Court in *Waters*, citing a contemporaneously filed decision in *Commonwealth v. Legg*, 417 A.2d 1152 (Pa. 1980), noted that its ruling would have prospective effect only. *Waters*, 418 A.2d at 318.

Other decisions cited by the Court of Appeals in support of its "nonretroactive" decision are not persuasive. For example, *Young v. United States*, 124 F.2d 794, 799 (7th Cir. 1997), was decided prior to *Bousley*. *Young's* refusal to apply *Bailey* retroactively was based, in part, on the fact that "the Supreme Court has not held that *Bailey* applies retroactively[.]" *Id.* at 795. Likewise, *Hohn v. United States*, 99 F.3d 892 (8th Cir. 1996),[9] and *Brennan v. United States*, 867 F.2d 111, 121 (2d Cir. 1989), preceded

[9] *Hohn* was vacated on other grounds by decision of June 15, 1998, *Hohn v. United States*, 524 U.S. 236 (1998), approximately one month prior to issuance of the Court of Appeals' decision below.

this Court's *Bousley* decision. Hence, their ongoing merit is dubious.

The Commonwealth cannot argue that it was surprised by the Pennsylvania Supreme Court's decision. Indeed the very issue underlying this scenario, that is whether the DER permit was repudiated by Petitioner's and Mr. Scarpone's actions, was raised at trial when the judge was asked to clarify the instructions to the jury (J.A. 128). As such, the nonretroactivity principle has no role in this case.

The Court of Appeals' decision distorts this Court's nonretroactivity principle by expanding its scope far beyond this Court's original intention. The impact is that no remedy exists for a state prisoner who is imprisoned in violation of his due process rights.

Since the time of trial, Petitioner has argued continuously that due process required the state to prove the absence of a permit. Even if the state Supreme Court had not spoken in *Scarpone*, Petitioner's claim would be viable. The real impact of *Scarpone* is that it shows the validity of Petitioner's claim that an unambiguous element of the crime was the absence of a permit. The prosecutor's convoluted argument is ambiguous, but the statute is not.

The Third Circuit's ruling negates the role of habeas corpus relief intended by Congress and earlier by the framers of the Constitution. In *The Federalist* No. 84, Alexander Hamilton explained the Writ's inclusion in Article I, § 1 of the nascent constitution as "a remedy for [the] fatal evil" of what Blackstone termed the "engine of

arbitrary government." *See 1 William Blackstone, Commentaries* *136. The baseless conviction of Petitioner Fiore, his innocence, his ongoing punishment, and the absurd disparity in treatment of Petitioner and his co-defendant reflect arbitrariness that should not be countenanced by courts.

4. Assuming, Arguendo, That *Teague* Retroactivity Principles Apply, This Case Fits Within An Enumerated Exception.

Alternatively, assuming *arguendo* that Petitioner is seeking the benefit of a new rule, the *Scarpone* decision falls within the first exception to the nonretroactivity principle. This Court has held that two exceptions apply to this rule. The first applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). This exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson*, 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), *aff'd*, 536 F.2d 1013 (3d Cir. 1976).

While *Teague's* analysis of retroactive application is not directly applicable here, its holding and Justice Harlan's discussion of habeas jurisprudence in *Mackey v.*

United States, 401 U.S. 667, 675 (1971) (opinion concurring in part and dissenting in part), emphatically point to the same result that Petitioner seeks. Justice Harlan argued in *Mackey* that new constitutional rules generally should not be applied retroactively on collateral review. He recognized, however, an exception where the new rule makes "certain kinds of conduct beyond the power of criminal lawmaking authority to proscribe." *Id.* at 693. Justice Harlan explained:

> [n]ew "substantive due process" rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

Id. at 692-693 (footnotes omitted).

Mackey looked to *United States v. United States Coin & Currency, supra,* in which this Court considered its earlier decisions holding that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct constitutionally could not be held criminal. 401 U.S. at 724; *see also Robinson v. Neil,* 409 U.S. 505, 509 (1973).

Similarly here, Petitioner's conduct, as admitted by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, even if the *Scarpone* decision was a "new rule," the facts of this case fall within the first exception to the nonretroactivity principle.

The Court of Appeals erred in refusing to follow the well-established constitutional principles of due process and the nonretroactivity rule and its significant exceptions carved out by this Court. As a result, persons within the jurisdiction of the Third Circuit have lesser rights to avoid basic injustice of wrongful conviction and confinement than do those of other Circuits. This Court should reverse the Court of Appeals decision to protect individuals including Petitioner Fiore from such a fundamental disparity and injustice that does not comport with constitutional standards.

5. The Habeas Statute Perpetuates An Historical Remedy To Resolve Egregious Miscarriages Of Justice Including The Incarceration Of Innocent Individuals.

The unique and independent nature of the "Great Writ" was explained by the Supreme Court in *Fay v. Noia,* 372 U.S. 391 (1963). In rejecting the State's suggestion that fact-finding by the state court had *res judicata* effect on federal habeas review, the Supreme Court responded:

> It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle that res judicata is inapplicable in habeas proceedings, [ ] is really but an instance for the larger principle that void judgments may be collaterally impeached. [ ] So also, the traditional characterization of the writ of habeas corpus as an original [ ] *civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom,* emphasizes the independence of the federal habeas proceedings from what has gone before.

Id. at 423-24 (footnotes and citations omitted) (emphasis supplied).

The Supreme Court has always adhered to the principle that the "Great Writ" is, at its core, an equitable remedy. *Schlup v. Delo,* 513 U.S. 298, 319 (1995). This Court has relied consistently on the equitable nature of habeas corpus to preclude application of strict rules of *res judicata*. Thus, for example in *Sanders v. United States,* 373

U.S. 1 (1963), the Court held that the court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id.* at 15-17. *See also McCleskey v. Zant*, 499 U.S. 467, 493 (1991).

The Court reaffirmed the equitable inquiry required by the "ends of justice" in a series of cases succeeding the *Sanders* decision. In *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), seven members of the Court rejected the argument that in the light of the 1966 amendments, "federal courts no longer must consider 'ends of justice' before dismissing a successive petition." *Id.* at 451 (plurality opinion).[10]

This Court in *Kuhlmann* provided important guidance regarding when the equities of a case are so balanced in a petitioner's favor as to supersede the general rules limiting review:

> Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.

Id. at 452. This Court concluded:

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[10] In *Kuhlmann*, this Court was called on to determine when, if ever, a successive habeas petition by a state prisoner should be entertained by the courts. The state argued that its interest in finality and the 1966 Congressional amendments to 28 U.S.C. § 2254 weighed against a second, or successive, review of a state court conviction by the federal judiciary. *Id.* at 451.

> In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.

Id. at 454.

Similarly, in *Murray v. Carrier*, 477 U.S. 478 (1986), this Court ruled that in an extraordinary case, where a constitutional violation probably has resulted in conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for procedural default. Justice O'Connor observed that the Court had adopted the "cause and prejudice" analysis in part because of its confidence that that standard would provide adequate protection to "victims of the fundamental miscarriage of justice." 477 U.S. at 495-96, *quoting Engle v. Isaac*, 456 U.S. 107 (1982). Justice O'Connor also noted, however, that the Court had candidly refused "to pretend that this always will be true." *Murray*, 477 U.S. at 496. For that reason, she continued, " '[i]n appropriate cases,' the principles of comity and finality that inform the concept of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Id.* at 495, *quoting Engle*, 456 U.S. at 135.

While each habeas decision is based on a unique set of facts, it is difficult to imagine a situation where a petitioner's innocence is more patent. The Supreme Court of Pennsylvania decisively concluded that the conduct

upon which Mr. Fiore's conviction stands does not constitute a crime under the Pennsylvania statute charged. These facts present the quintessential situation wherein justice demands that habeas corpus relief be imposed.

CONCLUSION

"It must," wrote Justice Jackson, "prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown v. Allen*, 344 U.S. 443, 537 (1953). The burial of Petitioner's valid quest for justice persisted until the United States District Court for the Western District of Pennsylvania carefully reviewed the history and record of this case in state court. In its opinion granting the requested habeas relief, that court succinctly explained the fundamental unfairness of this situation:

> The merits of this matter present uncommon circumstances: two intermediate appellate courts in Pennsylvania applied the same facts to the same statute and reached opposing conclusions. Based upon the opinion of the Court of Common Pleas, the Superior Court concluded that Fiore was properly charged and convicted of operating a waste disposal facility without a permit under section 606(f) of the SWMA. Conversely, the Commonwealth Court determined that Scarpone, Fiore's codefendant, could not be convicted under section 606(f) because the DER had in fact issued a permit to operate the facility.
>
> Additionally, the Supreme Court was internally inconsistent with its respective rulings.

(Pet. App. E-11 to E-12). The District Court further wrote:

> In *Davis v. United States*, 417 U.S. 333 (1974), the United States Supreme Court held that the appropriate inquiry for the retroactive application of a change in the criminal law is whether "the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice and . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Davis v. United States*, 417 U.S. 333, 346 (1984) (internal citations and quotations omitted).
>
> The Supreme Court's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) did not establish a new rule of criminal procedure. As a consequence, the *Teague* standard does not apply to Fiore's petition.

(Pet. App. E-14). Finally, the District Court concluded:

> The circumstances pertaining to Fiore's incarceration are exceptional because his conviction was affirmed by one intermediate state appellate court and his co-defendant's conviction was reversed by a different intermediate state appellate court. Fiore's situation is also unusual because he remained incarcerated while the affirmation of the Supreme Court of Pennsylvania set aside the conviction of his co-defendant. Therefore, under the Supreme Court of Pennsylvania's decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), Fiore is currently incarcerated for actions that did not constitute a violation of the section of the SWMA with which he was charged by the Commonwealth of Pennsylvania. Relatedly, the refusal by

> the Supreme Court of Pennsylvania to apply its decision to Fiore has resulted in an unjustified deprivation of his liberty interests.

(Pet. App. E-17).

Petitioner Fiore seeks to remedy a breach of his due process rights which has rendered him incarcerated for years based on his conviction of a crime while his co-defendant who was charged and convicted of the same crime, was released from that conviction by Pennsylvania's appellate courts. For ten years, Petitioner Fiore has brought this issue to the attention of the Pennsylvania state courts seeking nothing more than to be treated equally to his one-time employee and co-defendant. For unfathomable reasons, the Pennsylvania courts have refused to give Petitioner Fiore relief from this conviction which is indisputably based on insufficient evidence. As this Court has taught, "[t]he central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v. Collins*, 506 U.S. 390, 398 (1993).[11] Justice surely went awry in Pennsylvania. Upon exhausting all remedies in the state courts, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. His petition presented a strong showing of factual and legal innocence buttressed by a sound constitutional claim. As such it more than met the rigorous modern

---

[11] The habeas statute provides a civil procedure to remedy criminal convictions where, as here, constitutional deprivations are involved. *Neely v. United States*, 546 F.2d 1059, 1065 (3d Cir. 1976).

standards required for relief. *See, e.g.*, H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970). The District Court properly granted the writ. Thereafter, the Third Circuit Court of Appeals reversed that decision based upon an unconstitutional analysis which denies liberty to an innocent man as it endangers the freedom of the citizenry. If allowed to stand the Third Circuit's decision will water the Great Writ beyond recognition.

To remedy this miscarriage of justice and prevent it from recurring, Petitioner Fiore urges this Court to reverse the Third Circuit Court of Appeals' decision and grant him federal habeas relief.

Respectfully submitted,

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(8)

Supreme Court, U.S.
FILED
JUN 25 1999
CLERK

No. 98-942

In The Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,
Petitioner

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Respondents

On Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF ON THE MERITS

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62 pp

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Does the Due Process Clause obligate the states to apply new state appellate decisions interpreting state law to cases that are fina. on direct appeal before the new decision is announced ?

II. May the federal courts announce and apply a federal constitutional rule requiring the states to apply new state appellate decisions on questions of state law in a habeas case involving a state prisoner ?

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COUNTER-STATEMENT OF THE CASE

1. Petitioner, William Fiore ("Fiore") and his plant manager, Dave Scarpone ("Scarpone"), were charged with numerous criminal acts pertaining to the operation of a solid waste disposal plant. Both were convicted of numerous offenses, J. A. 6-7, including Disposing of Hazardous Wastes and Operating a Hazardous Waste Facility Without a Permit in violation of section 401 of the Solid Waste Management Act ("SWMA"), Pa. Stat. Ann. tit. 35, §6018.401(a) (West 1993), on the theory that the operation of the plant was so outside the permitted operation as to be tantamount to operation without a permit.[1]

The SWMA does not define the term "permit." *See* Pa. Stat. Ann. tit. 35, § 6018.103 (West 1993), Definitions. While the word "permit" tends to call to mind a wallet-sized card, Fiore's permit to operate the solid waste disposal facility was eight pages long. *See* Appendix to Petitioner's Brief at, Superior Court No. 485 Pittsburgh 1988, A2-A9. The length obtained from the fact that a permit to operate a solid waste disposal facility is not a "one-size fits all" authorization. Unlike a permit to drive a car or to carry a firearm, or a license to fish, all of which impose the same terms and conditions on all who hold them, a permit to operate a hazardous waste disposal facility in Pennsylvania is site and "waste stream" specific. The original permit, for the disposal of fly ash and pond ash produced by an electricity plant at a site designated as "Site B," incorporated

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[1]Fiore was additionally sentenced for convictions of bribery, obstructing administration of law and criminal conspiracy as well as conspiracy to commit murder. J.A. 242-43, n.l.

nine documents and was subject to six specific conditions. The permit was amended to include disposal of Class III demolition wastes within an area designated as "Site C," and further amended to include the disposal of industrial waste within an area designated as "Phase I Industrial Waste Pit," located within the original Site B. The amendments imposed numerous conditions on the Phase I pit, including the construction of a groundwater underdrain, liner monitoring drain, and groundwater monitoring wells. Appendix to Petitioner's Brief on direct appeal, A-8.

Obtaining a permit is a lengthy process. A prospective landfill operator submits to the Department of Environmental Resources ("DER"), now called the Department of Environmental Protection, a detailed form known as a "module" for each type of waste or "waste stream" intended to be received at the site. The "module" sets out "the type of waste to be accepted, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed." (J. A. 8) DER's technical staff reviews the module to determine, among other things, whether the particular "waste stream" is compatible both with other waste deposited on that site and with the site liner. "Modules" often are returned to the prospective operator several times for inclusion of more data before final disposition by the DER staff. (J.A. 9)

2. Fiore's problems with DER began when a DER inspector noticed "a strong organic odor" coming from a

manhole near the Phase I pit. (J.A. 10) The manhole was the site of the convergence of an under-drain, known as pipe 810, and pipe 711. The permit designated the under-drain as a monitoring point for the integrity of the pit liner. If the liner were to fail, materials seeping out of the pit through the liner would appear in the under-drain. Numerous samples of the discharge from the 711 and 810 pipes were collected and analyzed by DER. The samples tested positive for the presence of organic chemicals. (J. A. 10). Consequently, Fiore and DER officials agreed that Fiore would apply for a water quality permit which would set limits on the chemicals discharged from the site. If the discharge exceeded those limits, Fiore agreed to establish either a treatment plant on the site or to collect the discharge and transport it to a treatment plant. (J. A.11)

In November of 1983, a DER employee present at the landfill to obtain samples for testing noticed that the discharge flow from the 810 pipe had lessened significantly.(J. A. 11) When the DER employee returned in July of 1984, he observed no discharge coming from the 810 pipe. Curious, the employee climbed down into the manhole and maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates.(J.A.11)

In the summer of 1983, Fiore had hired a welder to cap the 810 pipe, install an elbow pipe and another smaller pipe which lead to an as yet unused disposal pit. Fiore observed the installation of the pipe and told the welder to hide it with a

rock.(J. A. 11) Fiore hired another welder to install a two-inch pipe below ground between two large pipes. A stand pipe stemmed from the two-inch pipe and reached the surface of the ground. A valve which could be turned on an off with a socket-wrench was inside this stand pipe and attached to the two-inch pipe. (J.A.11-12)

Capping the 810 pipe prevented water from under the Phase I pit from flowing into the 810-711 monitoring point. The organic odors from this discharge had lead to the discovery that hazardous wastes were seeping into the aquifer running under the pit.(J.A. 12) The newly installed connecting pipe brought water from an as yet unopened pit to a point in front of the cap. Had this alternation not been made, there would have been no flow at all to the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and into an unnamed tributary of the Youghiogheny River. (J. A. 10-12)

3. Based on these facts, both Fiore and Scarpone were convicted and sentenced. After sentencing, each pursued his appeal independently. At the outset of his State appellate process, Fiore filed post verdict motions with the trial court as was then required by State rules. Among his claims was a challenge to the sufficiency of the evidence underlying his conviction for violating section 401. Relying on settled case law

from Pennsylvania's Supreme Court, the trial court rejected Fiore's sufficiency argument. (J. A. 38-44) After exhaustively reviewing the evidence, the court concluded that Fiore's "alterations ... represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was 'un-permitted' after the alterations were undertaken by [Fiore]." (J. A. 44)

Fiore then filed a notice of appeal to the Pennsylvania Superior Court, the intermediate appellate court of general jurisdiction, including jurisdiction over criminal cases. 42 Pa. Cons. Stat. Ann. § 742 (West 1993) Superior Court, acting *sua sponte*, transferred Fiore's appeal to Commonwealth Court, the intermediate appellate court with jurisdiction to hear appeals from criminal actions arising from the violation of regulatory statutes administered by a Commonwealth agency. 42 Pa. Cons. Stat. Ann. § 762(a)(2)(ii)(West 1993). Fiore petitioned Commonwealth Court to return his appeal to Superior Court. Commonwealth Court granted the petition because "the facts and issues of [Fiore's] appeal were closely related to [the bribery] appeal taken by [Fiore] to [Superior] Court." (J. A.144) In contrast, Scarpone took his appeal of the denial of post verdict motions to the Pennsylvania Commonwealth Court which ultimately decided his appeal.

In Superior Court Fiore again advanced the argument that section 401 did not reach his conduct since he had a permit. (J. A. 65, V; 68, 5; 71-79; 87-94) His argument was largely one of

statutory construction as it had been in the trial court. In advancing this argument Fiore did not claim any federal due process right to reversal or cite to any federal cases supporting such a right. He urged reversal only because "[t]he charge and the verdict ... [were] contrary to law and evidence." (J. A. 94) Noting that Fiore raised 22 issues in his appeal (J. A. 67-70), the Superior Court unanimously affirmed his convictions and sentence "on the basis" of the "comprehensive and analytic opinion" of the trial court. (J. A. 99-100) Fiore sought discretionary review in the Supreme Court of Pennsylvania which was denied on March 13, 1990. When the time for certiorari elapsed, Fiore's conviction was final.

More than a year later, Commonwealth Court, in Scarpone's appeal, decided that section 401 did not reach the conduct alleged since the hazardous waste facility was permitted. *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991). (J. A. 104-114) Consistent with applicable Pennsylvania law, the Commonwealth Court remanded Scarpone's case to the trial court for resentencing. (J. A. 113-114) Fiore sought extraordinary relief from the Supreme Court based on the opinion issued in Scarpone's case. (J. A. 224, D) That application was denied. Thereafter, the Supreme Court affirmed the reversal of Scarpone's conviction, accepting the statutory construction argument that section 401 did not reach the conduct alleged because the hazardous waste facility was permitted. *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993)

("*Scarpone*"). (J. A. 123) Again, Fiore sought extraordinary relief from the Supreme Court seeking application of the decision in *Scarpone* despite the fact that his conviction had been final for more than three years. (J. A. 225, E) That application, too, was denied.

Fiore then sought collateral relief under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. §§ 9541 *et seq*. Fiore asserted entitlement to relief only as a matter of state law because, as a result of the *Scarpone* decision, Fiore's conviction resulted "from 'a violation of the ... laws of this Commonwealth ... which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.' "[2] (J. A. 130) He advanced no federal constitutional claim under the Due Process Clause or otherwise. The Common-

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[2]The statute at the time Fiore filed his state post conviction petition provided that relief could be obtained if the conviction or sentence resulted from, among other things:

> (2)(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

42 Pa. Cons. Stat. Ann. § 9543 (a)(2)(i) (West 1998).

wealth's response asserted, *inter alia*, that the decision in *Scarpone* could not be applied retroactively to Fiore's case. (J. A. 137 and 139)

The post conviction court denied relief, first concluding that the issue which Fiore was then attempting to raise "ha[d] been 'previously litigated.' " *See* Appendix to Petitioner's Brief at Superior Court No. 1892 Pittsburgh 1994, A-2. (J. A. 225, I)[3] The court explained that it had earlier "concluded that the fact that ...Fiore had a permit to discharge hazardous waste into the Phase 1 pit, did not insulate him from prosecution for the discharge of hazardous waste into an unnamed tributary of the Youghiogheny River " and that "[t]his continued to be the law at the time that the S[illegible]ior Court affirmed the decision ... and at the time that the Supreme Court denied Fiore's petition for allocatur."[4] *Id.*, pp.1-2. (J. A. 225, I) The court observed, "The

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[3]When Fiore filed his State post conviction petition, the statute provided, in pertinent part, that to be eligible for relief, a petitioner must prove the allegation of error had not been "previously litigated." 42 Pa. Cons. Stat. Ann §9543(a)(3). An issue was "previously litigated" if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa. Cons. Stat. Ann. § 9544 (a)(2) (West 1998).

[4]A petition for allocatur is the vehicle by which the Supreme Court exercises discretionary authority to review decisions of the State's intermediate appellate courts. Pa. R. A. P., Rule 1311 (West 1999); *see Castille v. Peoples*, 489 U.S. 346 (1989).

fact that the Supreme Court [of Pennsylvania] interpreted the law differently some years later in the case of ... *Scarpone* ... does not alter the state of the law at the time of [Fiore's] conviction and direct appeal." *Id.*, pp.1-2 (J. A. 225, I) After opining that Fiore had previously litigated this state law claim and was ineligible for relief under the terms of the statute, the post conviction court determined that, under the decisional law of the Pennsylvania Supreme Court, "[Fiore] is not entitled to a retroactive application of the ruling in *Scarpone* on collateral review because the decision was handed down after [Fiore's] direct appeal had concluded." *Id.*, p.3.

Fiore appealed. He advanced the same "laws of the Commonwealth" contention he had advanced in the post conviction court. Superior Court Brief for Appellant, p.8 (J. A. 225, I) He also raised three federal constitutional claims that had not been raised in the post conviction court. The Commonwealth complained that under State law and procedure, issues not raised in the lower court may not be raised for the first time on appeal. *See* Pa.R.A.P., Rule 302 (West 1998); *Commonwealth v. Baker*, 728 A. 2d 952, 953 (Pa. 1999).

Superior Court affirmed the denial of post conviction relief. (J. A. 161) At the outset, the court recited that Fiore's claim was based on the fact that Scarpone had obtained relief from his conviction under section 401 but that Fiore had not and that, as a result, Fiore was deprived of due process and equal protection and subjected to cruel and unusual punishment. (J. A.

141) The court never again mentioned Fiore's constitutional claims. After addressing a State procedural matter, the court agreed with the post conviction court that the statutory construction issue which Fiore raised had been "previously litigated."[5]

Superior Court recognized the "uniqueness" of Fiore's situation, but decided his case under settled Pennsylvania law on the retroactivity of new appellate decisions rendered after a conviction is final on direct appeal, citing *Commonwealth v. Gillespie*, 516 A. 2d 1180 (Pa. 1986), as had the post conviction court. After citing a number of Pennsylvania cases in accord with *Gillespie*, the court concluded "there is no support in the case law of this Commonwealth for the result sought by [Fiore] in this case." (J.A. 157-160)

Fiore was again denied discretionary review in the Supreme Court. He filed a petition for writ of habeas corpus in the federal district court in which he claimed he was incarcerated for conduct which the state supreme court determined did not constitute a crime, (J. A. 166), and that he was denied due process and equal protection by the State courts' refusal to apply *Scarpone* to his case. (J. A. 167) In apparent response to the

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[5]Under state law, "[a]n issue may not be relitigated merely because a new or different theory is posited as a basis for reexamining an issue that has already been decided." *Commonwealth v. Senk*, 437 A. 2d 1218, 1220 (Pa. 1981) (plurality); *See Commonwealth v. Lark*, 698 A. 2d 43, 47 n. 3 (Pa. 1997).

contention raised during Fiore's appeal from the denial of post conviction relief that these constitutional claims had not been properly raised in the state courts, Fiore asserted that

> [t]o extent he did not specifically raise the denial of his right to due process and equal protection, that issue was not ripe until he has exhausted all avenues of relief, and been denied. It would be futile for him to return to the state court system with this claim in light of the courts' previous decisions.

(*Id.*)

In his brief in support of his petition Fiore again asserted denial of his rights under the Due Process, Equal Protection and Cruel and Unusual Punishments Clauses. (J. A. 184) In discussing exhaustion of state remedies, Fiore noted that Respondents had taken the position during the post-conviction proceedings that he had waived his "unequal treatment claim." He asserted that the facts did not support this contention. (J. A. 193) He argued that the state court determinations that he had "previously litigated" his claim demonstrated exhaustion.(J. A. 193-194) Fiore said that his constitutional claims were based on the theory that he was entitled to the "retroactive benefit of the Pennsylvania Supreme Court's decision in . . . *Scarpone*." (J. A. 194)

In answering the petition, Respondents pointed out that Fiore raised no constitutional claims in his state post conviction petition but framed his issues on appeal from the denial of post

conviction relief as, *inter alia*, a denial of due process. (J.A. 215) Respondents said that Fiore exhausted a *Jackson v. Virginia*, 443 U.S. 307 (1979), sufficiency of the evidence claim during his direct appeal, but that any issue concerning the construction of the SWMA was not exhausted. (J.A. 217). Respondents did not expressly waive exhaustion as to any claim and took the position that any statutory construction claim could not form the basis of federal habeas corpus relief because it presented a state law question and habeas relief is unavailable for alleged violations of state law. (J. A. 217-218) Respondents argued, based on controlling decisions of the Pennsylvania Supreme Court on this state law question, and consistent with this Court's precedent, that the state courts were not required to give Fiore the retroactive benefit of *Scarpone*. (J. A. 218-223).

The magistrate judge recommended that the writ be granted and that Fiore be released from any sentence resulting from his conviction for violating section 401, determining that due process and equal protection required the retroactive application of the decision in *Scarpone*. (Pet. App. E-18) Respondents objected to the report and recommendation, asserting, among other things, that if any relief was appropriate it extended only to Fiore's resentencing, the same relief obtained by Scarpone. The district court rejected the objections and ordered the relief recommended by the magistrate judge. (Pet. App. D-2)

Respondents appealed and the Court of Appeals reversed. The Court of Appeals determined that the district court's conclusion that due process required retroactive application of *Scarpone* "is at odds with [this] Court's longstanding position that 'the federal constitution has no voice upon the subject' of retroactivity." (Pet. App. A-8) The court recognized that "[s]ince 'it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions,'. . .Fiore is entitled to relief only if federal law requires retroactive application of *Scarpone*." (*Id.*) The court concluded that the Due Process Clause does not require retroactive application of *Scarpone* and reversed the district court. (*Id.*, at A-13) After reargument was denied, Fiore sought certiorari which was granted.

SUMMARY OF ARGUMENT

1. Fiore crafts his argument as one of actual innocence so as to avoid the precedential effect of *Great N.Ry. Co v. Sunburst Oil Ref. Co.*, 287 U.S. 358 (1932), and *Teague v. Lane*, 489 U.S. 288 (1989), which together work to deny him relief. As a state prisoner Fiore is subject to the limitations imposed by section 2254, yet he ignores these requirements and asserts actual innocence without the necessary cognizable constitutional claim. The Pennsylvania courts resolved this case on the basis of state law. Because it is the sole prerogative of state courts to say what state law is, state construction of state law is not a

constitutional violation which federal habeas relief may remedy. This Court acknowledges that litigants on direct appeal and those on collateral attack may obtain disparate results without a violation of due process. The result Fiore seeks requires that *Sunburst Oil* be overruled and that the distinction recognized in *Teague* and its progeny be eliminated.

2. When the Pennsylvania courts adjudicated Fiore's request to apply the new decision in *Scarpone* to him, clearly established federal law, as determined by this Court in the 1932 decision in *Sunburst Oil*, and never questioned thereafter, held that the federal constitution had "no voice" on the subject of retroactivity. It necessarily follows that a state court does not offend due process when it decides as a matter of state law not to apply an appellate decision giving a new construction to a state statute to a case that was final when the new decision was announced. Whether a state rule is "new" for state retroactivity purposes is itself a question of state law, not subject to federal oversight.

3. *Teague* prohibits a federal court from announcing a new rule on habeas review of a state prisoner's conviction. Because no existing precedent requires states to apply new appellate decisions on state law questions to cases that were final before the new decision was announced, establishing such a precedent would constitute a "new rule" outside either of the two *Teague* exceptions. Such a result would violate, as well, the concerns of federalism which come to the fore when this Court

reviews habeas claims of state prisoners. Over the years this Court has understood that the states serve as "laboratories" for the evolution of state law. This function cannot be served if state construction of state statutes, absent any federal constitutional claim, can be upset by federal courts.

4. The due process claim presented here was raised in the states courts in a procedurally defective manner that precluded consideration on the merits. The state courts decided Fiore's case solely on state law grounds. Any federal claim is now jurisdictionally barred in state court. There is no cause for this default. "Actual innocence" as a gateway to habeas relief could be established only if a new rule is announced and the states are required to apply new appellate decisions to cases already final when the new decision is announced. Such a result would extend federal habeas relief to state prisoners in a manner directly contrary to the past three decades of this Court's habeas jurisprudence and to the Congressional intent expressed through the 1996 amendments to the federal habeas statute.

ARGUMENT

I. Fiore Is Not Innocent, Having Been Convicted by a Jury Upon Proof Beyond A Reasonable Doubt.

1. Without directly acknowledging the Blackstonian theory that courts discover old law, rather than create new law,

1 Blackstone, Commentaries 69 (15th ed. 1809), Fiore builds his argument on that foundation. Since the Pennsylvania Supreme Court decision in *Scarpone*, was not "new," he argues, there is no question of its "retroactive" application to him. In the past he asked for the retroactive application of *Scarpone*. Now he does not ask for the application of *Scarpone* at all, but merely for his due process rights. The Court of Appeals was wrong to engage in retroactivity analysis. Fiore is "innocent" and always has been. Because he is both "factually and legally innocent," he should be free. Because he is not free, Pennsylvania is violating his due process rights. This Court, he believes, should give him relief.

Framing the argument this way has great utility for Fiore, for it frees him, in his eyes, of both the precedential force of *Great N. Ry. Co. v. Sunburst Oil Ref. Co.*, 287 U.S. 358, 364 (1932) (federal constitution has no voice upon the subject of retroactivity) and the restrictions of *Teague v. Lane* 489 U.S. 288 (1989)(plurality)("new rule" may not be announced on habeas review, except within two narrow exceptions). But the issue which this Court must decide is not whether Fiore should now get the same relief as Scarpone, but whether *Sunburst Oil* should be over-turned. For to give Fiore the relief he requests would require this Court to over-rule *Sunburst Oil*. Such a decision would have vast implications. If *Sunburst Oil* were to be over-ruled in the context of Fiore's case, a habeas claim brought by a state prisoner, this Court would impose the "new

obligation" that states make available to prisoners seeking collateral relief the application of state appellate decisions construing state law and announced long after the petitioner's direct appeal was final. Such a holding would be in direct contravention of *Teague* and its progeny and contrary to the last three decades of this Court's habeas jurisprudence which has retracted, not extended, the scope of habeas relief to state prisoners.

2. In asserting his claim of "innocence," Fiore evidences little appreciation that habeas relief for a prisoner in state custody must be obtained within the framework of 28 U.S.C. § 2254 which, as a starting point, requires a claim that the state prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." When, as in *Scarpone*, a state supreme court construes a state statute and when, as on appellate review of the denial of collateral relief to Fiore, a state appellate court follows state law on retroactivity and denies application of that construction, where does a claim cognizable under section 2254 lie? It lies nowhere because it is the prerogative of state courts to say what state law means, *Engle v. Isaac*, 456 U.S. 107, 128 (1982), and because it is the prerogative of state courts to determine whether state laws are to be applied prospectively or retroactively. *Sunburst Oil*, 287 U.S. 358.

Evolution of state law by state courts is precisely what the founders intended of our federal system of government. Standing alone, evolution of state law by state courts is not a

constitutional violation which federal habeas review is to correct. "It is not the province of a federal habeas court to re-examine state-court determinations of state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1998).

Superior Court resolved Fiore's statutory construction issue on direct appeal consistent with existing case law interpreting other regulatory statutes involving unpermitted activity and relied upon by the Commonwealth in seeking to uphold Fiore's conviction. *See Commonwealth, DER v. Fleetwood Borough Auth.*, 346 A. 2d 867 (Pa. Commw. 1975); *Trevorton Anthracite Co. v. Commonwealth, DER*, 400 A. 2d 240 (Pa. Commw. 1975). At the time of Fiore's direct appeal, the Pennsylvania courts were willing to accept an interpretation of section 401 that allowed broad exercise of the state's police powers. Such an interpretation was consistent with the articulated legislative intent that the SWMA was intended to "protect" "the public health, safety and welfare," Pa. Stat. Ann. tit. 35, § 6018.12(4)(West 1993) and that it should "be liberally construed, so as to best achieve and effectuate the goals and purposes hereof." Pa. Stat. Ann. tit. 35, § 6018.901(West 1993). The Pennsylvania Supreme Court retracted the reach of section 401 in *Scarpone* in an opinion squarely contrary to the construction of the statute approved by Superior Court in Fiore's direct appeal. In this course of events, where does the constitutional claim lie?

If federal habeas relief is able to reverse the accretion of state law, then state courts will be reluctant to revisit prior holdings, regardless of a demonstrated need for reassessment. A significant disincentive for the corrective process of the state courts will be in place and states will place the highest priority on preserving already obtained convictions "so as to forestall an impact upon the administration of their criminal law so devastating as to need no elaboration." *Tehan v. Shott*, 382 U.S. 406, 418 (1966). Under such a system, the law will suffer and so will later litigants who have arguably valid claims.

3. Certainly, the claim of "innocence" which Fiore advances is in no way cognizable under section 2254. Fiore wants the same relief as Scarpone, *i.e.*, he wants the *Scarpone* decision applied retroactively to him. Retroactivity presents no constitutional claim. *Sunburst Oil*, 287 U.S. at 364. Claims of innocence independent of a constitutional violation are not cognizable in federal habeas. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution - - not to correct errors of fact." *Id.* As Justice Holmes recognized, on habeas review federal courts examine "not the petitioners' innocence or guilt but whether their constitutional rights have been preserved." *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923), cited in *Herrera*, 506 U.S. at 400. Four decades later, Chief Justice Warren made a similar

observation in *Townsend v. Sain*, 372 U.S. 293, 317 (1963), saying of newly discovered evidence:

> Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

See Herrera, 506 U.S. at 400.

4. The disparate results obtained by Fiore and Scarpone do not implicate core due process concerns. Due process does not require the retroactive application of new appellate decisions by state courts to convictions that had obtained finality on direct appeal before the new decision was rendered. "With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the court directly and those that come here in collateral proceedings." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) If Fiore is right, then the decisions of this Court which apply new rules to cases on direct review, *Griffith v. Kentucky*, 479 U.S. 314 (1987), but deny such application to cases on collateral review, *Teague*, 489 U.S. 288, are suspect.

> [D]ue process does not require that every conceivable step be taken at whatever cost, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden

> merely because there is a remote possibility in some instances that an innocent person might go to jail.

New York v. Patterson, 432 U.S. 197, 208 (1977)

5. Fiore is not without recourse. A state forum exists in which he may seek relief. Under Pennsylvania law, Fiore may seek executive clemency from the Pennsylvania Board of Pardons and the Governor. Pa. Const., art. 4, § 9 (West Supp.. 1998); Pa. Stat. Ann., Tit. 61. § 2130 (West Supp. 1992). *See Herrera*, 506 U.S. at 414 n. 14. "Clemency. . .is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411. "Executive clemency has provided the 'fail safe' in our criminal justice system." *Id.* at 415.

II. Due Process Does Not Obligate The States To Apply New State Appellate Decisions Interpreting State Law To Cases That Are Final On Direct Review Before The New Decision Is Announced.

1. The situation in which Fiore finds himself is virtually identical to that of the habeas petitioner in *Wainwright v. Stone*, 414 U.S. 21 (1973). Stone had been convicted under a statute which he argued was vague. Before he was charged, the Florida Supreme Court had construed the statute and held that the acts

that Stone was accused of committing were clearly within its ambit. After his conviction was affirmed, the Florida Supreme Court revisited the question in another case and determined that the statute was unconstitutionally vague. The Florida court chose not to apply its decision to earlier convictions and the Florida courts specifically refused to apply it to Stone's case as he requested on collateral review. Citing *Sunburst Oil*, this Court said that state courts were not "constitutionally compelled to [apply the new decision to convictions like Stone's which were obtained before the new decision] or to make retroactive its new construction of the Florida statute." *Stone,* 414 U.S. at 23-24.

When the Pennsylvania courts adjudicated Fiore's request to apply the new decision in *Scarpone* to him, "clearly established Federal law, as determined by" this Court[6] in *Sunburst Oil* and not questioned thereafter, held that the federal Constitution had "no voice" on the subject of retroactivity. The Pennsylvania courts rejected Fiore's request to apply the new construction of a state statute in *Scarpone* to himself, based on Pennsylvania Supreme Court decisional law that prohibited the application of the new rule to cases already final on direct appeal when the new decision was announced. Since the state law

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[6]*See* 28 U.S.C. § 2254(d)(1). While this is the appropriate standard for resolution of a properly presented habeas claim, citation to this provision is not a concession that any federal constitutional claim was fairly presented to the State courts or that such a claim was adjudicated on the merits. Those questions will be addressed, *infra*.

determination in *Scarpone* involved no recognized constitutional right, it may not form the basis of habeas corpus relief, nor may such a right be announced on habeas review of a state prisoner's conviction. *See Teague,* 489 U.S. at 316 (1989)(*plurality*); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

2. A state court does not offend due process when it decides as a matter of state law not to apply an appellate decision giving a new construction to a state statute to a case that had achieved finality before the new decision was rendered. "[W]hether this division of time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known at the common law ... there is no denial of a right protected by the Federal Constitution." *Sunburst Oil,* 287 U.S. at 364. In *Sunburst Oil*, the state supreme court had decided to overrule an earlier decision at issue in the case then before the court, but to apply the new interpretation of state law only prospectively. On certiorari, the oil company complained, saying the Constitution required the state court to give it the benefit of the new ruling.

This Court disagreed and rejected the"novel stand" that the Constitution "is infringed by the refusal" of a state court to apply a new state law decision to a case before the state courts. *Id.* "The choice for any state may be determined by the juristic philosophy of the judges of its courts, their conceptions of law, its origins and nature." *Id.* at 365. "A state in defining the limits of adherence to precedent may make a choice for itself between

the principle of forward operation and that of relation backward." *Id.* at 364. The wisdom of the choice made by state courts on questions of state law is not subject to review by the federal courts. *Id.* at 365.

> If this is the common-law doctrine of adherence to precedent as understood by the courts of [the state], we are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

Id. at 365. "[T]he Federal Constitution has no voice upon the subject." *Id.* at 364.

In crafting state law on the retroactive application of new judicial decisions, the Pennsylvania Supreme Court specifically recognized this principle. *Blackwell v. Commonwealth, State Ethics Comm'n*, 589 A.2d 1094, 1098 (Pa. 1991) (retroactivity is question for state courts as Constitution neither requires nor prohibits retroactive or prospective application of new decision; *citing Sunburst Oil*; *Linklet. v. Walker*, 381 U.S. 618 (1965); *United States v. Johnson*, 457 U.S. 537 (1982)).

While this question is no longer "novel," this Court has regularly cited *Sunburst Oil* for the proposition that the Constitution does not speak to the subject of the retroactivity of

new judicial decisions. *See Linkletter,* 381 U.S. at 629 n.14 (federal constitution "has no voice" on retroactivity)(citing *Sunburst Oil*)); *Wainwright v. Stone*, 414 U.S. at 23-24 (state not "constitutionally compelled" to apply new ruling declaring state statute void for vagueness after petitioner's conviction under now-infirm statute was final on direct appeal; *citing Sunburst Oil*); *Solem v. Stumes*, 465 U.S. 638, 642 (1984) ("retroactivity not compelled, constitutionally or otherwise"; *citing Sunburst Oil*); and *Harper v. Virginia Dept. Of Taxation*, 509 U.S. 86, 100 (1993) (recognizing "freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law"; *citing Sunburst Oil*).

3. Whether a state rule is "new" for state retroactivity purposes is itself a question of state law. *See Sunburst Oil*, 287 U.S. 358. In 1977, the Pennsylvania Supreme Court adopted the criteria of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), for determining when a judicial opinion announces a "new rule" as a matter of state law. Under Pennsylvania law, a decision establishes "'a new principle of law, either by overruling clear past precedent ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed .... " *Blackwell,* 589 A. 2d at 1100 (*quoting Schreiber v. Republic Intermodal Corp.*, 375 A. 2d 1285, 1289 (Pa. 1977), as having adopted the *Chevron* standard)).

Certainly it cannot be said that the Pennsylvania State Supreme decision in *Scarpone* was "clearly foreshadowed."

Superior Court's resolution of Fiore's statutory construction issue on direct appeal was consistent with existing, relevant case law. *See Fleetwood,* 346 A. 2d 867, and *Trevorton,* 400 A. 2d 240. Fiore sought to distinguish *Fleetwood* on appeal, noting that the Commonwealth relied upon it in making its argument. (J.A. 78). In reversing Scarpone's conviction, Commonwealth Court felt compelled to distinguish both *Trevorton* and *Fleetwood* which the Commonwealth had (successfully) argued required affirmance of Fiore's conviction on direct appeal. (J. A. 108-110) Further, the Superior Court opinion in Fiore's direct appeal was squarely contrary to the ultimate construction of the statute in *Scarpone,* a sure indication that *Scarpone* established "a new principle of law." The reference in *Scarpone* that the opinions of the Superior Court and the Commonwealth Court were in conflict on the statutory construction issue and left the Attorney General's office "ill-advised on how it should proceed in such situations" implies the same. (J. A. 121) Indeed, it can be said that *Scarpone* overruled the decision in Fiore's case *sub silentio.*

The decision by the Superior Court was a decision on the merits by that court of all of Fiore's claims (save one sentencing claim that was procedurally barred), contrary to the view expressed by Fiore's amicus. *See* Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner ("Petitioner's Amicus Brief"), p. 14, n.13 and related text. The Supreme Court recognized that this

statutory construction issue was resolved by Superior Court when it wrote, "[t]he Superior Court found the evidence sufficient ....upholding his conviction of operating a hazardous waste facility without a permit." (J. A. 121)

This passage also resolves, as a matter of state law, that Fiore's statutory construction claim was decided by Superior Court and not solely by the trial court. Superior Court reiterated this view when it upheld the denial of post conviction relief. All of this serves to refute the contention of Fiore's *amicus* that the opinion interpreting the statute in Fiore's case is entitled to no deference by the federal courts because the opinion was issued by a court of common pleas. (J. A. 157-158) In any event, the cases cited by Fiore's *amicus* for this proposition are inapposite and generally are not cases on habeas review of state court convictions. *See* Petitioner's Amicus Brief, pp. 6, 14, n.13.

One case cited by Petitioner's *amicus is* a habeas case and it does have relevance to Fiore. In *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), the Court cites *Brown v. Ohio*, 432 U.S. 161, 167 (1967), which said that the decision of Ohio's intermediate appellate court then under review "authoritatively defined the elements" of the state crime. For this *Brown* cited *Garner v. Louisiana*, 368 U.S. 157, 169 (1961), being "mindful that the Ohio *courts* 'have the final authority to interpret. . . that State's legislation'." *Brown, supra* (emphasis added). This Court did not limit itself to pronouncements of the Ohio Supreme Court. *See also Shuttlesworth v. City of Birmingham*, 382 U.S.

87, 91 (1965) (looking to ruling of state's intermediate appellate court in another case as "authoritatively" construing state statute at issue).

Both the post conviction court and Superior Court concluded that Scarpone announced a "new rule" for State retroactivity purposes. The Court of Appeals accepted this as state law. Since "it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), that *Scarpone* announced a new rule for state retroactivity purposes may not be questioned in habeas review. *See Bishop v. Wood*, 426 U.S. 341, 346-347 (1976) (this Court ordinarily defers to federal court of appeals' interpretation of state-law questions); and *O'Sullivan v. Boerckel*, No.97-2048, 1999 WL358962*10 (June 7, 1999) (Stevens, J., dissenting) (same).

III. The Extension Of Habeas Relief Which Fiore Seeks Would Constitute A New Constitutional Rule Of Procedure Which May Not Be Announced Or Applied On Habeas Review.

1. Until now, no decision of this Court requires state courts to apply a new state appellate decision interpreting a state criminal statute to a case which was final on direct appeal when the new decision was announced. *See Sunburst Oil*, 287 U.S.

358; *Harper*, 509 U.S. 86. Due process does not require it. *See Sunburst Oil*, 287 U.S. 358; *Linkletter*, 381 U.S. at 625 (describing *Sunburst Oil* as "denying a federal constitutional due process attack on the prospective application of a" state court decision).[7]

In *Linkletter*, a habeas petitioner whose conviction had become final before the decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), sought application of *Mapp* to overturn his conviction. The Court was asked to articulate an absolute rule that "retroaction prevails in constitutional adjudication." The Court refused, stating: "[W]e believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice on the subject,'" *Linkletter*, 381 U.S. at 629 n.4 (*citing Sunburst Oil*).

A number of states have taken the Court at its word and fashioned their own retroactivity rules, adopting *Linkletter* or some other formulation for these state law questions. *See* Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 Ala L. Rev. 421, 460-76, Appendix (1993)(cataloguing various approaches states have taken on retroactivity of new state decisions).

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[7]Since Fiore is seeking habeas relief on a claim that has heretofore not been the basis of such relief, *see Wainwright v. Stone*, it is appropriate to examine this claim as one of procedural rather than substantive due process. *See Herrera v. Collins*, 506 U.S. at 407-408 n. 6.

2. To now say the Constitution requires the retroactive application of new state appellate decisions on state law questions to cases that were final on direct appeal before the new decision was announced would "impose[] a new obligation on the States." *Teague,* 489 U.S. at 301. Such a rule would clearly "break new ground." *Id.* Based on the clear and unequivocal pronouncements in *Sunburst Oil*, *Linkletter* and, most recently *Harper*, such a rule was not dictated by precedent at the time Fiore's conviction became final in 1990. Based on *Teague* and its progeny, such a pronouncement would be a "new rule."

Fiore claims, relying on Pennsylvania rules of statutory construction, *Jackson v. Virginia*, 443 U.S. 307 (1979), and *In re Winship*, 397 U.S. 358 (1970), that by the time his case was decided on direct appeal the Constitution, as interpreted by this Court, already provided that a conviction not supported by proof beyond a reasonable doubt could not stand as a matter of due process. With these general statements there is no quarrel. Nor can it be seriously argued that when Fiore's case was decided on direct appeal these precepts, to the extent they were implicated, were violated. The Pennsylvania trial and appellate courts, relying on settled case law which tracks *Jackson*, rejected a sufficiency argument, concluding that the statute reached Fiore's conduct. He raised and lost a statutory construction argument. After Fiore's direct appeal was concluded, this argument was accepted in another prosecution under the same statute. It is irrelevant, for present purposes, that the other case

involved Fiore's co-defendant and co-conspirator. Fiore's *Jackson/Winship* claim cannot establish that the rule he now seeks is not "new." As this Court has recognized, "the test [for a new rule] would be meaningless if applied at this level of generality." *Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (rejecting assertion that rule was not "new" for *Teague* purposes though earlier pronouncements had generally required reliability in capital sentencing).

3. Generally, a "new rule" may not be announced or applied on habeas review. *Teague*, 489 U.S. at 316. The two narrow exceptions to this general rule do not apply to Fiore's case. A "new rule" may be announced or applied on habeas "if it places 'certain kinds of primary, private conduct beyond the power of the criminal law-making authority to proscribe.'" *Caspari v. Bohlen,* 510 U.S. 383, 396 (1994) (quoting *Teague*, 489 U.S. at 307). While Fiore claims that the decision in *Scarpone* determined as a matter of state law that what he did is not criminal, that decision can hardly be said to have placed some kind of primary, private conduct beyond the power of the criminal law-making authority to proscribe. *Scarpone* said that Fiore's conduct "was execrable and constituted a clear violation of the permit." (J. A. 122) *Scarpone* did not say that the conduct charged could never be criminal. The decision simply said that it did not violate the statute charged and suggested another more appropriate and more serious charge. (J. A. 121-122)

Importantly, however, the focus of a *Teague* analysis is on the rule to be announced and applied in the case before the Court; here, whether due process requires state courts to apply new state appellate court decisions to cases already final by the time the new decision was announced. Such a rule could hardly be said to place any primary, private conduct beyond the criminal lawmaking authority. It is, instead, simply a rule of decision.

Nor does the suggested rule that Fiore seeks fit within *Teague*'s second exception. "New rules" in this category are "'those procedures that ... are "implicit in the concept of ordered liberty.' " *Id.* at 311. This second exception is "to be reserved for watershed rules of criminal procedure." *Id.* The *Teague* plurality said; "we believe it unlikely that many such components of basis due process have yet to emerge." *Id.* at 313.

> Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular

> conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime.

Id. 311(quoting *Mackey v. United States*, 401 U. S. 667, 693-94 (1971). In *Saffle v. Parks*, 494 U.S. 484, 495 (1990), the Court further explained this exception, saying: "The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (citing *Teague*, 489 U.S. at 311; *Butler v. McKellar*, 494 U.S. 407, 416 (1990)).

The rule that Fiore seeks here is not of the type referred to in the second *Teague* exception which has been epitomized by citing to *Gideon v. Wainwright*, 372 U.S. 335 (1963). Requiring states to apply their new interpretations of state statutes to cases that were final on direct appeal when the new decision was announced will not make a case that was fair when it was decided more fair. Such a rule has nothing to do with the fundamental fairness and accuracy of the original trial. It is not of the ilk of *Gideon* and the right to counsel which impacts on the entire trial process. Nothing has occurred in the years since 1990, when Fiore's case became final on direct appeal, or since 1993, when this Court last said the states were free of constitutional restraint in deciding when to apply their new appellate decisions retroactively, which could possibly have altered the fundamental bedrock principles and changed the

judicial perception of fairness in this area. The "new rule" which Fiore seeks cannot be announced here.

4. Just as Justice O'Connor wrote in *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), this, too, "is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas cases." As noted early in this Brief, our federalism recognizes the prerogative of state courts to say what state law means. *Engle v. Isaac*, 456 U.S. 107, 128 (1982). What "state law means" is often a matter of "accretion of case law." *Dobbert v. Florida*, 432 U.S. 282, 292 (1977). State courts alone should accrete state law.

Six decades ago Justice Brandeis wrote of the "happy incident[s] of the federal system that a single courageous state may, if is citizens choose, serve as a laboratory, and try novel social and economic experiment without risk to the rest of the country." *New York State Ice Co. v. Liebmann*, 285 U.S. 262, 322 (1932) (Brandeis, J., dissenting). Justice Brandeis' characterization of states as laboratories for evolving law has continued vitality six decades later. "[F]or the states may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581(1995) (Kennedy, J., concurring). But States cannot be laboratories for the evolution of state law if, when the states' highest courts construe state law, federal courts are then free to unravel previously obtained state

court convictions through the mechanism of federal habeas relief--even in the face of contrary state law with respect to the retroactive application of state law decisions.

Federalism also adheres to the principle that state courts are not inferior courts. *Ex parte Bollman*, 8 U.S. 75 (1807). Indeed, state courts are "coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. 227, 239 (1990). *See also Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922) (rank and authority of state courts and lower federal courts are equal). In the past three decades, federal habeas jurisprudence has scaled back the availability of the writ to state prisoners in light of "the profound societal costs that attend the exercise of habeas jurisdiction" and "our enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1500 (1998); *see also Barefoot v. Estelle*, 463 U.S. 880, 887-888(1983)(role of federal habeas is "secondary and limited; Federal courts are not forums in which to relitigate State trials.").

Teague signaled a major refocusing on both the "nature, function, and scope" of the writ. 489 U.S. at 306. These federalism concerns animated *Teague* and its calculus which

> validates reasonable, good-faith interpretations of existing precedents made by state courts . . . and thus effectuates the States' interest in the finality

> of criminal convictions and fosters comity between federal and state courts.

Gilmore v. Taylor, 508 U.S. 333, 340 (1993)(citations omitted).

In 1996 Congress also acted to preserve the states' interests and amended the federal habeas statute with the "apparent general purpose to enhance the States' capacities to control their own adjudications" by setting out a "highly deferential standard for evaluating state court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7(1997).

The considerations of "finality, federalism and fairness," *Withrow v. Williams* 507 U.S. 680, 697 (1992) (O'Connor, J. concurring) that inform our habeas jurisprudence are a prime reason why cases involving federal prisoners decided under 28 U.S.C. § 2255, relied on by Fiore and his *amicus*, have little, if any, application to Fiore's case. For example, Fiore urges this Court to grant him relief because, in his eyes, *Bousley v. United States*, 523 U.S. 614 (1998), stands for the proposition that "a post conviction challenge based on [a previously decided case of statutory construction] may raise a constitutional claim." Petitioner's Brief, p. 31. Such a reading of *Bousley* ignores its context. As a federal prisoner, Bousley may seek habeas relief for a violation of a federal statute, without any underlying constitutional claim (although he did, in fact, also assert a constitutional violation). *See* 28 U.S.C. § 2255. Fiore, a state prisoner, cannot seek the retroactive application of a state statute without an underlying constitutional violation. There is no

constitutional claim in Fiore's quest for retroactive application of *Scarpone* and he must fail. *Bousley* does nothing to change that inevitable result.

There is a fundamental difference between this Court deciding whether its own interpretation of a federal statute should be applied to cases on collateral review and a federal court "reexamin[g] state-court determinations on state-law questions," See *Estelle v. McGuire,* 502 U.S. at 67-68; *see Withrow v. Williams*, 507 U.S. at, 715 (Scalia, J. dissenting)(describing course of federal habeas review of federal conviction). The difference lies in our federalism. This Court has the prerogative to construe federal statutes. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). Without an underlying constitutional claim, this Court must be silent as to the meaning and application of state statutes. *See Webb v. Webb*, 451 U.S. 493, 499 (1981).

In *Bousley* the inherent tension was between the legislative and judicial branches of a single government, 118 S. Ct. at 1610 (only Congress, not the courts, can make conduct criminal). The same tension existed in the section 2255 cases occurring in the wake of this Court's construction of the federal mail fraud statute in *McNally v. United States*, 483 U.S. 350 (1987), also inappropriately relied on for relief by Fiore. Brief for Petitioner, pp 33-35.

The inherent tension in Fiore's case is not between the branches of a single government but is, instead, between the co-

equal state and federal courts. "The tension in federal habeas between the vindication of individual rights and federal concerns over comity. . .are peculiar only to the federal system, where comity and the federal-state balance play a major role in the Court's limiting the reach of federal habeas." *Hutton, supra.* The Court of Appeals understood this distinction and acted accordingly. (Pet. App. A-12)

> Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'

Alden v. Maine, No. 98-436, 1999 WL412617*5 (June 23, 1999) (quoting *Seminole Tribe of Fla v. Florida*, 517 U.S. 44, 71 n.4 (1996)). The states as sovereign entities are vested with the historic and primary police powers so as to protect "the lives, limbs, health, comfort and quiet of all persons." *Medtronic v. Lohr*, 518 U.S. 470, 474 (1996).

Finality of the criminal law serves the sovereign states in carrying out these powers.

> [W]e repeatedly have recognized that collateral attacks raise numerous concerns not present on direct review. Most profound is the effect on finality. It goes without saying that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved; no society can afford forever to question the

> correctness of its every judgment. "[T]he writ," however, "strikes at finality," depriving the criminal law "of much of its deterrent effect," and sometime preventing the law's just application altogether. "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation"

Withrow v. Williams, 507 U.S. at 698 (O'Connor, J., concurring in part and dissenting in part).

No less today, than when the Constitution was adopted, "[t]he States thus retain 'a residuary and inviolable sovereignty.'" *Alden.* The relief Fiore seeks is contrary to that "inviolate sovereignty" which foresees state courts construing state statutes and making their own decisions as to the retroactive application of new state law decisions.

IV. The State Courts Did Not Adjudicate Fiore's Due Process Retroactivity Claim On The Merits.

1. As the Court of Appeals noted, Fiore's petition, filed after April 24, 1996, was "subject to the additional requirements of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19(1996).

(Pet. App. A-7, n.3). *Accord Lindh v. Murphy*, 521 U.S. 320 (1997). Since the Court of Appeals determined that Fiore could not succeed on the merits of his claim, the court found it unnecessary to decide whether Fiore had exhausted the claim that he was denied due process by the state courts' failure to apply *Scarpone* retroactively or whether the State courts had adjudicated the claim on the merits. *See* 28 U.S.C. § 2254(b) and (d). (Pet. App. A-7 n.3) In fact, the state courts never adjudicated that federal claim on the merits. The claim was never presented to the post conviction court. That failure was urged as a waiver under state law when Fiore attempted to raise it for the first time on appeal from the denial of post conviction relief. The Superior Court, while noting the federal claim, never addressed its merits. The Superior Court addressed Fiore's state law claim that he was entitled to relief "because [w]hat [Fiore] is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." (J. A. 149). The court concluded, first, that the state statutory construction claim had been "previously litigated" and could not be "litigated again in a post-conviction proceeding," relying on "settled [state] law." (J. A. 158) Next, the court said that, under state law, new state appellate decisions are not applied retroactively to cases that were final on direct appeal before the new decision was rendered. (J. A. 159-160)

2. Fiore was denied state collateral relief on the basis of these state law grounds. The Court of Appeals recognized that,

based on this Court's decisions, questions of retroactive application of new state appellate decisions are state law questions. (Pet. App. A.-8, A-9) After determining that no federal question was presented by Fiore's claim, the court reversed the granting of the writ. (Pet. App. A-13)

As explained above, the due process claim was not presented to the post conviction court and was considered waived as a matter of state law when Fiore tried to raise it for the first time on appeal from the denial of post conviction relief. *See Commonwealth v. Baker*; Pa. R. A. P., Rule 302 (West 1998). This is a separate state law ground for decision and constitutes a procedural bar to the federal courts' consideration of this due process claim.

Since the federal claim was presented in a procedurally defective fashion and since the state appellate court affirmed the denial of relief on Fiore's state law claim on state grounds, it is of no moment that the state court did not specifically mention this procedural ground as a basis for denial of relief. Fiore noted the waiver argument in his petition and disputed it. Respondents noted that Fiore had raised no due process issue in his post conviction petition but attempted to do so only when he appealed the denial of post conviction relief. Thus, as to this claim, it did not "appear[] that [Fiore] has exhausted the remedies available to him in the courts of the State ...." 28 U.S.C. § 2254 (b)(1)(A). Fiore did not "give [the] state courts a fair opportunity to act on [his] claims." *O'Sullivan v. Boerckel*, No. 97-2048, 1999 WL

358962*4 (June 7, 1999). Though exhaustion as to one claim was conceded, Respondents did not expressly waive exhaustion as to any other claim. 28 U.S.C. § 2254(b)(3). Accordingly, the contention that this claim was procedurally barred was before the district court. *See Trest v. Cain*, 522 U.S. 87 (1997).

Fiore now has no state forum in which to present this federal claim. Subject to exceptions not relevant here, all petitions for post conviction relief must be presented within a year after a petitioner's conviction becomes final on direct appeal. 42 Pa. Cons. Stat. Ann. § 9545 (b) (1) and (3)(West 1998). Fiore's conviction became final in 1990. A new petition would be time-barred. Pennsylvania courts would be without jurisdiction to entertain a second post conviction petition. *Commonwealth v. Banks*, 726 A.2d 374, 376 (Pa. 1999).

Fiore's present due process claim is, therefore, exhausted because it is procedurally barred. *See Coleman v. Thompson,* 501 U.S. at 732 (habeas petitioner who has defaulted federal claims in state court meets technical requirements for exhaustion; no state remedies are available to him).

It should be of no moment that the state appellate court did not rely on this specific procedural bar to avoid ruling on this federal claim. The opinion is quite clear that Superior Court based its ruling on state law. *See Coleman,* 501 U.S. at 734 and 739 (no "plain statement" required where federal claim not presented to state court and not exhausted so procedurally barred or where it does not "fairly appear" that state decision

rested primarily on federal law or was interwoven with such law). *Compare Castille v. Peoples*, 489 U.S. 346, 351 (1989)(no exhaustion "where the claim has been presented for the first and only time in a procedural context in which the merits will not be considered unless 'there are special and important reasons therefor'"); and Pa. R. A. P., Rule 302, 42 Pa. Cons. Stat. Ann. (West 1998) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Nothing more would have been served by the Superior Court specifically addressing the argument that the federal claim was barred under state law because it was not raised in the post conviction court. That was simply another state ground upon which Superior Court could have denied review, with the resultant denial of state post conviction relief.[8]

3. To overcome his default, Fiore must demonstrate cause for the default and actual prejudice resulting from it

---

[8]This Court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). Such a position "merely asserts additional grounds why the decree should be affirmed." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). A respondent "is entitled to rely on any legal argument in support of the judgment below." *Schiro v. Farley*, 510 U.S. 222, 228-229 (1994). This is particularly so where, as in this case, the Court of Appeals said it was avoiding the question of exhaustion and Respondents alerted the Court to an exhaustion issue in its Brief in Opposition. Respondents' Brief in Opposition, p. 7. *See Schiro v. Farley*, 510 U.S. at 229.

Murray v. Carrier, 477 U.S. 478, 485 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). In the alternative, he must demonstrate that he is actually, factually innocent of the offense with which he was charged and convicted in the State court. *Murray*, 477 U.S. at 496; *Smith v. Murray*, 477 U.S. 527, 537 (1986). He is unable to properly do either.

Fiore's due process claim would have met the same fate as his state law claim had he presented it to the post conviction court: any claim that the statute did not apply to him was previously litigated and, therefore, could not form the basis of post conviction relief, even when presented as a new theory. *See Commonwealth v. Senk*, 437 A.2d at 220. Moreover, this claim was just as clearly available when Fiore filed his post conviction petition as it was when he raised it belatedly for the first time on appeal. The legal basis for the federal claim was available to him at the procedurally required time. *Strickler v. Greene*, No. 98-5804, 1999 WL 392982 *12 (June 17, 1999); *Reed v. Ross*, 468 U.S. 1, 16 (1984).

Nor, is Fiore able to show a miscarriage of justice in the nature of factual, actual innocence necessary to overcome the bar. *Schlup v. Delo,* 513 U.S. 298 (1994), teaches that when a state habeas petitioner seeks to establish the "miscarriage of justice" exception of *Sawyer v. Smith* and *Murray v. Carrier* so as to give life to an otherwise procedurally barred claim, he must show that a constitutional error resulted in the conviction of one who is "actually innocent." "The meaning of actual

innocence as formulated by *Sawyer*, and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup,* 513 U.S. at 868.

Fiore has no new evidence. The jury which convicted him was well aware that Fiore had a permit to do particular things in particular ways. The evidence as to that was plain. And if by chance, a juror had misapprehended that fact, the trial court reiterated, in response to a question which arose during deliberations,

> that it was clear the facility had a permit but that the Commonwealth alleged: that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation . . . was an unpermitted operation. . .

(J. A. 179)

Is it "more likely than not that no reasonable juror" could have convicted Fiore under the Commonwealth's theory of the case? Are we bound by the tautology that a permit is a permit is a permit, despite ample evidence that *in the context of this case* the permit was site and "waste stream" specific and that Fiore had no permit to alter the ground-water monitoring system as he did? Is it worthy of consideration that, years after Fiore' conviction, the judge who tried him wrote that Fiore was not an innocent man serving a sentence and deserving of post

conviction relief. Appendix to Petitioner's Brief at Superior Court No. 1892 Pittsburgh 1994, pp.5-6. Is it worthy of consideration that a Superior Court judge, in affirming that denial of relief, wrote that Fiore's conviction, despite the *Scarpone* decision, was neither a "miscarriage of justice" nor "an extraordinary circumstance warranting a departure from the provisions of the PCRA." (J .A. 162).

Fiore's argument of "actual innocence" is based on his insistence that he is entitled to the same relief as Scarpone because the Pennsylvania Supreme Court decision in *Scarpone* announced what the law had always been. The state courts denied him that relief as a matter of state law. Were this Court to grant relief on this claim it will have "extended" habeas corpus relief, to use Fiore's word, to an area where it has never before been extended in contravention of earlier decisions of this Court which the state courts relied on in denying relief and in fashioning state law on the retroactivity of new state appellate decisions. *See Sunburst Oil; Blackwell, supra.*

Habeas review of state court decisions, particularly in light of the recent amendments to the federal habeas corpus statute, is designed to guarantee that state courts "toe the constitutional mark." *Solem v. Stumes,* 465 U.S. at 653 (Powell, J., concurring in judgment); *Teague*, 489 U.S. at 307. The federal courts must examine the claim from the perspective of clearly established federal law as determined by this Court at the time the state courts decided the issue. 28 U.S.C. § 2254 (d)(1);

Teague; Saffle; Butler. When the state courts decided that *Scarpone* did not have to be applied retroactively to Fiore's case, nothing in this Court's retroactivity jurisprudence indicated that the Constitution required otherwise. The exact opposite was true. *See Sunburst Oil*; *Wainwright v. Stone*. To entertain this claim and grant relief would be an improper extension of the federal writ of habeas corpus.

CONCLUSION

"There is perhaps 'nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.' " *Calderon v. Thompson,* 118 S. Ct. at 1500, quoting Bator, *Finality in Criminal law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 451 (1963).

Pennsylvania's courts decided Fiore's appeals consistent with their understanding of the relevant law. Judge Novak of the Court of Common Pleas of Allegheny County, who was on the bench during trial, who denied Fiore's many post verdict motions and who denied post conviction relief, disposed of Fiore's claim for collateral relief, writing:

> The decision which we reach today is consistent with a long line of cases balancing the right to seek collateral relief after one's direct appeals

have been exhausted with the need for some finality in the law. It is also consistent with Justice Harlan's view that cases on collateral review should be considered in light of the law as it stood when the conviction became final. *See Mackey v. the United States*, 401 U.S. 667 (1971).

Finally, we point out that this is [Fiore's] second collateral attack on his conviction. . . . We recognize that the Court may entertain multiple collateral appeals, particulary in a case where the Court determines that an innocent man is serving a sentence. This, however, is not such a case. No court has decided that the evidence against either [Fiore] or [Scarpone] was insufficient to prove that [Fiore] discharge[d] hazardous waste into an unnamed tributary of the Youghiogheny River.

Appendix to Petitioner's Brief at Superior Court No. 1892 Pittsburgh 1994, pp 5-6.

In concurring in the affirmance of Judge Novak's denial of post conviction relief, Superior Court Judge Hoffman noted

> there are circumstances where a departure from the PCRA's stringent eligibility requirements is appropriate, such as where there are extraordinary circumstances or a miscarriage of justice.

(J.A. 161-162) Fiore's case, he found, was not one of those circumstances.

> In the instant case, the evidence at trial clearly demonstrated that [Fiore] deliberately altered the ground-water monitoring system, wrongfully discharged hazardous waste into an unnamed tributary of the Youghiogheny River and lied under oath to the Commonwealth Court. Although [Fiore] is serving a sentence for a conviction based on evidence which would no longer support a conviction in Pennsylvania, I believe [Fiore's] conviction was not a miscarriage of justice or an extraordinary circumstance warranting a departure from the provisions of the PCRA.

(J.A. 162)

For the reasons stated herein, Respondents respectfully ask this Court to affirm the decision of the Court of Appeals of the Third Circuit which reversed the grant of federal habeas relief.

Respectfully submitted

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Supreme Court, U.S.
FILED
JUL 27 1999
OFFICE OF THE CLERK

No. 98-942

In The

Supreme Court of the United States

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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25 Pa. Code § 75.280 (1986)..... 12, 13, 15

ADDITIONAL STATUTORY PROVISIONS AT ISSUE

In response to Respondent, Petitioner has cited to regulatory procedures in effect at the time of the alleged violations. The applicable code provisions are found in Chapter 75 (Solid Waste Management), Subchapter D (Hazardous Waste), 25 Pa. Code § 75.259 through 25 Pa. Code § 75.282 (1986).[1] Due to their length and expired status, Petitioner has included the relevant provisions in an attached Appendix.

SUMMARY OF THE ARGUMENT

In their Brief, Respondents attempt to sound an alarm that the grant of relief to Petitioner would place settled jurisprudence about state retroactivity on a slippery slope. The argument is ill-founded because the pending case does not challenge state retroactivity options. Rather it is a simple and narrow request for relief from a prisoner who is factually and legally innocent.

Respondents posit the novel suggestion that relief would overrule *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and undercut an interest in finality. The same sort of claim of upheaval in the law could have been made when the Court ruled in *Bousley v. United States*, 514 U.S. 614 (1998), which assuredly has not occurred. Neither *Sunburst Oil* nor *Wainwright v. Stone*, 414 U.S. 21 (1973) controls because neither case addressed the key issue here: a federal court's independent duty to ensure that a habeas petitioner is afforded his rights under the Due Process Clause when he is factually and legally innocent. By relying on these cases Respondents are attempting a radical sweep of settled jurisprudence by undermining the *Teague v. Lane*, 489 U.S. 288 (1989) protections for innocent prisoners.

Respondents inaccurately present the record and the law to this Court. First, at the time of the trial and conviction in

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[1] The relevant provisions were enacted in 1980 and not amended until well after the conviction.

the instant case, there was no controlling precedent on point by the Supreme Court of Pennsylvania. *Scarpone* was the first authorative construction of the statute under which Petitioner was convicted. Second, Respondents incorrectly argue that Petitioner's due process issue was not exhausted. Petitioner raised and exhausted an insufficiency of the evidence claim which, under well-established Pennsylvania law ignored by Respondents, preserves the due process claim. Finally, Respondents' explanation of Pennsylvania's permit process obscures that the statute and regulations were clear at the time of the alleged offense. The regulations defined "permit" and required specific official action to revoke a permit.

The *Scarpone* holding also is distorted by Respondents. First, contrary to their Brief, *Scarpone* does not create a "new principle of law." The statute – requiring the government to prove beyond a reasonable doubt that Petitioner did not have a permit – is clearly written. The Pennsylvania Supreme Court's *Scarpone* decision was thus foreshadowed by constitutional principles and statutory construction rules, which as a matter of due process obligate the courts to construe strictly criminal statutes and provide prior notice of the elements of an offense. *Scarpone* simply adopted what the statutory and regulatory language foreshadowed. It did not create new law. Second, *Scarpone* held that absence of a permit is a necessary element of the offense. Because the defendant there had a permit – the same one held by Petitioner – he was factually innocent of the charged offense.

Respondents' rhetorical attempts to nevertheless paint Petitioner as a "bad man" who is in some sense culpable are unavailing. This Court cannot ignore the violation of Petitioner's constitutional right to be convicted on legally sufficient evidence because he may have violated some "other" provision of the SWMA.

ARGUMENT

A. PETITIONER'S *JACKSON v. VIRGINIA* CLAIM, THAT HE WAS CONVICTED ON THE BASIS OF FACTS WHICH DID NOT ESTABLISH AN ELEMENT OF THE CRIME CHARGED, DOES NOT IMPLICATE ANY STATE LAW RETROACTIVITY CONCERNS.

Neither Respondents nor their Amici quarrel with the maximum that Due Process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged." *In re Winship*, 397 U.S. 358, 364 (1970). In their zeal to define this case as one involving solely issues of retroactivity of state law, however, Respondents fail to address a primary question presented by this case: when defining the elements that must be proved to sustain a conviction, must a federal court ignore an authoritative state articulation of those elements solely because that construction was rendered after the defendant's conviction became final. This question is *not* answered by the retroactivity cases relied upon by Respondent: *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) or *Wainwright v. Stone*, 414 U.S. 21 (1973). Therefore, Petitioner asks this Court – on the narrow facts presented by this case – to hold that where a state high court has authoritatively construed a statute to include an element not proved at a criminal defendant's trial, such a construction is binding on a federal court considering a properly filed and presented habeas corpus claim.[2]

The threshold question is not whether *Scarpone* must be applied "retroactively" to Petitioner's original conviction, but whether that decision – decided *before* Petitioner filed his habeas petition – may be applied to Petitioner's habeas

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[2] Respondents do not dispute that Petitioner has properly exhausted his claim based on *Jackson v. Virginia*, 443 U.S. 307 (1979) (R.Br. at 12) [Respondents' Brief on the Merits will be referred to hereafter as "R.Br."], and thus this basis for granting Petitioner habeas relief is unquestionably presented to this Court. As discussed *infra*, Petitioner has also properly exhausted his other claims based on the Due Process Clause.

petition as authoritative law. On this issue, the primary case relied upon by Respondents, *Sunburst Oil*, simply has nothing to say. Petitioner's due process claim is not centered on retroactive application of *Scarpone;* it is based on Respondents' failure to prove every element of the offense charged. *Compare, Sunburst Oil* at 361-364. Nor is *Sunburst Oil* a criminal case wherein due process/notice issues were addressed and an individual's liberty was at stake. Rather, it dealt with basic economic issues involving tariffs on intrastate shipments. *Id.* at 359.

The procedural posture and substantive holding of *Sunburst Oil* demonstrate its inapplicability here. The *Sunburst Oil* trial court applied statutory construction tenets prescribed by the state's highest court and applicable at the time of the complained of transactions, despite a subsequent decision reversing the previously approved construction. Here, contrary to Respondents' assertions, absolutely no precedential support existed at the time of Petitioner's trial. *Compare,* R.Br. at 4-5. The issue raised in state court in *Sunburst Oil* was not of constitutional dimension, but instead:

> whether, under the law of this state, a board of railroad commissioners has power and authority to make a retroactive order finding that the rates charged and collected on the shipment [ ] were unjust and unreasonable, thus permitting the plaintiff to recover the amount charged and collected on the basis of such tariff and the amount found by the commission to be a reasonable rate [ ].

Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 928 (Mont. 1932), *aff'd Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In resolving that controversy, the Montana Supreme Court ruled:

> Under our statutes, so long as the rates established by the commissions are in force, they are presumed to be reasonable, and neither the commissions nor the courts have power to retroactively declare such established rates unreasonable[.]

Id. at 929. This ruling overruled a prior decision, but the Montana Supreme Court declined to apply the new rule to the parties before it. As presented to this Court, the issue in

Sunburst Oil whether any constitutional principle required Montana's Supreme Court, in overruling a prior decision, to apply the new rule to the parties before it. *Id.* at 361. This Court concluded that retroactive application of the Montana court's decision was not required. Significantly, the court explained its decision as follows:

> We have no occasion to consider whether this division in time of the effects of a decision is a sound or unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, *there is involved in it no denial of a right protected by the Federal Constitution.*

Id. at 364 (emphasis added). Contrary to Respondents' broad reading of this language, to the extent that a state court's retroactivity decision can *never* implicate federal constitutional principles, this quoted passage expressly limits *Sunburst Oil* to those instances where refusals to apply the law retroactively do not implicate some other constitutional right. The holding is thus inapplicable here, where Petitioner's due process right under *Jackson v. Virginia*, 443 U.S. 307 (1979) and its progeny, to be convicted upon evidence of every element of the crime charged, has been infringed. Unlike in *Sunburst Oil*, where a state statute presumed promulgated rates in effect at the time to be valid, *id.* at 359, a federal habeas court is required to assess independently Petitioner's sufficiency of the evidence claim according to federal due process principles. *Sunburst Oil* does not suggest that state retroactivity rules would dictate what law applies in a federal proceeding.

Petitioner here is seeking to attack the constitutionality of the trial proceeding on its face. In the alternative, he seeks retroactive application of a decision which found earlier decisional law to be unconstitutional in a manner that directly implicates his liberty rights. Respondents' extensive reliance on that case is its attempt to blur the fact that Petitioner's retroactivity argument, should this Court reach that issue, is premised squarely on the innocence exception in *Teague v. Lane*, 489 U.S. 288 (1989). Respondents' excessive reference to *Sunburst Oil* appears to be an attempt to have

this Court undermine the protections afforded to innocent prisoners by the *Teague* exceptions. *Sunburst Oil* was decided long before *Teague*, in which this Court spoke authoritatively on retroactivity in the criminal context. If Petitioner's case is denied on the basis of *Sunburst Oil*, even clearly innocent state court prisoners will be denied the established protections afforded by *Teague*.

Nor does *Wainwright v. Stone*, 414 U.S. 21 (1973), in any sense control. Far from being "virtually identical" to *Stone* (R.Br. at 21), Petitioner's case is critically different. In *Stone*, *prior to the time that the defendants engaged in the conduct for which they were charged*, the Florida Supreme Court had authoritatively construed the state's sodomy statute to cover the acts they committed. *Id.* at 22. The sole issue in *Stone* was whether the defendants had been accorded due process notice, and this Court held that the Fifth Circuit had erred in independently determining that Florida's sodomy statute was unconstitutionally vague where cases of the Florida courts "afforded appellees ample notice that their conduct was forbidden by law." *Id.* at 23. The Court did not hold, under sufficiency principles, that the defendants' conduct was *not a crime* covered by the statute of conviction. In the instant case, to the contrary, the state high court has ruled that the precise conduct engaged in by Petitioner is not sufficient to convict him of the crime charged.

The "retroactivity" question in *Stone* was secondary to the issue of notice, and arose *only* because the state itself had voided the sodomy statute on vagueness grounds after the defendants were convicted. *Id.* at 23. The ruling did *not* amount to a holding that the defendant had not violated the law. In the situation presented, the change in Florida's decisional law did not affect the defendants' convictions: "[T]his holding did not remove the fact that when appellees committed the acts with which they were charged, they were on clear notice that their conduct was criminal under the statute then construed." *Id.* The opposite is true here: at the time Petitioner and Scarpone engaged in the conduct for which they were convicted, *no* case put them on notice that such conduct was violative of section 401 of the SWMA. More

importantly, the issue here is not merely one of notice, but whether the statute as drafted and construed covers the very conduct for which Petitioner was convicted and imprisoned. The Court in *Stone* expressly acknowledged that the defendants' conduct was covered by the statute under which they were convicted. *Id.* Thus, *Stone* has nothing to say on the issue of whether a defendant can be constitutionally imprisoned for conduct that does not violate the statute of conviction.

Whereas the Florida Supreme Court had overruled prior precedent, the Pennsylvania Supreme Court decision in *Scarpone* changed no law but rather rendered the *first* authoritative construction of the elements of section 401. As recognized by the Pennsylvania Supreme Court, the theory used to convict Petitioner was not a well-settled interpretation of state law, but a "bald fiction" (J.A. 122). The conduct Petitioner engaged in, as a factual and legal matter, was not the crime charged. Sustaining his conviction in the face of a state decision – on identical facts – establishing that one element of the charged crime was not proved at trial would violate due process; *Stone* is not to the contrary.

B. RESPONDENTS MISSTATE THE RECORD AND THE LAW.

1. There Was No Case Law Support For The Conviction.

Respondents' representation that the trial court rejected Petitioner's sufficiency of the evidence argument on "settled case law from the Pennsylvania Supreme Court" (R.Br. at 4-5) is belied by the trial court's opinion (J.A. 38-44). Aside from citing standard cases regarding the Commonwealth's duty to prove every element of a crime beyond a reasonable doubt and the defendant's right to clear notice of the charges, the trial court cited no cases ruling on or even discussing the offense or conviction.

2. Petitioner's "Sufficiency Of The Evidence" Claim In State Court Exhausted His Due Process Claim.

The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary. *Rose v. Lundy*, 455 U.S. 509, 515 (1982). A state prisoner may initiate a federal habeas petition "[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated. . . . " *Picard v. Connor*, 404 U.S. 270, 276 (1971). "It follows, of course, that once the federal claim has been **fairly presented** to the state courts, the exhaustion requirement is satisfied." *Id.* at 275 (emphasis supplied).[3]

Pleading legal claims in the state courts for exhaustion purposes requires reasonable clarity and specificity. A petitioner should present a claim in a form that is sufficiently understandable and gives the state courts a meaningful opportunity to address it. The majority approach among the circuits is that claims may be fairly presented to state courts without citing the Constitution if they contain terms sufficiently particular as to call to mind the specific constitutional protection.[4] The question then is whether Petitioner "fairly presented" his due process claim in state court.

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[3] This Court's recent decision in *Duncan v. Henry*, 513 U.S. 364 (1995), did not change the *Picard* rule that a federal claim which has been "fairly presented" in state court satisfies the exhaustion requirement. *Id.* at 366. In *Duncan*, the issue in state court was that testimony was erroneously admitted because it was irrelevant and inflammatory. The state court reviewed the habeas petitioner's claim by a standard that was not the substantial equivalent of a due process/fair trial analysis. The Court in *Duncan* clearly did not intend to diminish *Picard*. Rather, that decision is based on well-established law that the issue presented in state court must be "virtually identical" to the constitutional issue, not "somewhat similar." *Id.* at 366.

[4] *See, e.g., Beam v. Paskett*, 3 F.3d 1301, 1305 (9th Cir. 1993) (state court challenge of penalty statute as "unconstitutionally arbitrary" necessarily reflected Eighth Amendment prohibition

In *Smith v. Goguen*, 415 U.S. 566, 577 (1974), this Court rejected the state's exhaustion defense, holding that where a prisoner presented to state courts the argument that Massachusetts' flag misuse statute was vague as applied, the prisoner preserved his due process claim for purposes of federal habeas corpus jurisdiction. *Ford v. Georgia*, 498 U.S. 411 (1991), held that although petitioner's "pretrial motion made no mention of the Equal Protection Clause, and his later motion cited the Sixth Amendment, not the Fourteenth," because the petitioner's challenge to the "pattern of excluding black persons from juries 'over a long period of time'. . . . could reasonably have been intended and interpreted to raise a claim under the Equal Protection Clause," it was deemed as having done so. *Id.* at 418-419. In the instant case, there is no doubt that Petitioner presented the operative facts and a sufficiently similar legal theory to fairly present a Due Process Clause violation to the Pennsylvania courts.

Despite this Court's direction that briefs address only due process and retroactivity, Respondents briefed procedural exhaustion and, in doing so, miscast the nature of Petitioner's claims raised in state proceedings. Respondents misrepresent that Petitioner's direct appeal argument was "largely one of statutory construction" and claim he did not raise or exhaust his due process claim (R.Br. at 5-6). To the contrary, the fifth issue raised by Petitioner in his direct

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of arbitrary aggravating circumstances); *Verdin v. O'Leary*, 972 F.2d 1467, 1480 (7th Cir. 1992) (references to accused's "right 'to be present at critical stages of his trial' and his right 'to a fair trial' " were "particular enough to call to mind" underlying Sixth and Fourteenth Amendment rights); *Stewart v. Scully*, 925 F.2d 58, 62 (2d Cir. 1991) (petitioner's "claim that enhancement of the sentence violated constitutional decisions was sufficiently particular to [invoke] double jeopardy principles"); *Hawkins v. West*, 706 F.2d 437, 439 (2d Cir. 1983) ("reasonable doubt" references "qualifi[ed] as an 'assertion of the claim so particularized to call to mind a specific right protected by the Constitution' ").

appeal was one of sufficiency of evidence to support the verdict (J.A. 68).

Evans v. Court of Common Pleas, 959 F.2d 1227, 1231-33 (3d Cir. 1992), is persuasive on the proposition that under Pennsylvania law a sufficiency of the evidence claim "fairly represents" constitutional due process. In *Evans*, the habeas petitioner had not stated due process as a claim for relief in state court; rather, she challenged the sufficiency of the evidence to support her conviction. Noting that the test for sufficiency is the same under Pennsylvania and federal law, the court ruled that the due process claim was exhausted. *Id.* Although "[s]ubstantive deviations between superficially similar federal and state claims often exist," *Nadworny v. Fair*, 872 F.2d 1093, 1100 (1st Cir. 1989), if an individual's claim, asserted in terms of state law, is "functionally identical – a point of more than trifling concern" to a federal claim, "we must regard the federal claim as fairly presented." *Id.* at 1099-1100. *Accord, Pilon v. Bordenkircher*, 444 U.S. 1 (1979).

Respondents likewise inaccurately state that Petitioner waived his due process claim by failing to raise it in his post-conviction relief petition (R.Br. at 40). Pennsylvania's post-conviction law allows review only of claims "not previously litigated." 42 Pa. Cons. Stat. § 9543(a)(3). As discussed above, Petitioner litigated his due process claim on direct appeal and, thus, could not do so in a collateral attack.

3. State Regulations Do Provide Definitional Guidelines For The Term "Permit" And Specify The Process To Be Followed By The DER For Permit Revocation.

In an attempt to compensate for the incorrect charging of Petitioner, Respondents assert that "permit" under Pennsylvania's Solid Waste Management Act ("SWMA"), 35 Pa. Cons. Stat. § 6018.101, *et seq.*, is not defined (R.Br. at 1). The

regulations promulgated pursuant to the SWMA[5] define "permit" as follows:

> A written document issued by the Department [of Environmental Resources] under the act [the SWMA] which authorizes the recipient to undertake the treatment storage or disposal of hazardous waste under the act.

25 Pa. Code § 75.260 (Pet.R.Br. App. 3). Respondents argue that Petitioner violated 35 Pa. Cons. Stat. § 6018.401(a) because he deviated from the terms of the permit (R.Br. at 45 ["Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit. . . . "]). *See also id.* at 1-4, 8, 27, 46, and 49. This theory was summarily rejected as a "bald fiction" in *Scarpone* (J.A.

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[5] Pennsylvania's SWMA regulates and controls the solid waste practices in the Commonwealth of Pennsylvania. 35 P.S. § 6018.102. The Legislature of Pennsylvania delegated to the Environmental Quality Board ("EQB") the duty of establishing and implementing rules and regulations to achieve the purpose of the SWMA. *Id.* at § 6018.105. The EQB, however, is not permitted to create new crimes or to expand the rules beyond the SWMA. To the contrary, the rules only can amplify the SWMA. *See Baumgardner Oil Co. v. Commonwealth of Pennsylvania*, 606 A.2d 617, 623-624 (Pa. Commw. 1992). Article V of the SWMA (35 P.S. §§ 6018.501-6018.508) governs this application and permit process.

Relevant regulations governing issues surrounding the management of hazardous waste – identifying and listing hazardous waste, establishing the permitting requirements, and creating the process by which permits are granted, modified, suspended or revoked – were set forth in Title 25 of Pennsylvania's Administrative Code under Chapter 75 "Solid Waste Management"; Subchapter D "Hazardous Waste". The implementing code provisions cited herein refer to the provisions in effect at the time of Petitioner's trial and conviction. Subchapter D was added August 2, 1980, 10 Pa. B. 3163 (1980). In light of the fact that these are historical code provisions, Petitioner has included the relevant provisions in an Appendix to this Reply Brief ("Pet.R.Br. App.").

121). It remains illogical for two reasons: a different provision makes it a violation of the SWMA to deviate or depart from the terms of a permit, 35 Pa. Cons. Stat. § 6018.302(a); second, the SWMA and its regulations set forth explicit procedures for issuing, modifying and revoking a permit (Pet.R.Br. App. 3-13).

Although Petitioner argued at trial that the SWMA explicitly provides procedures for revoking, suspending or modifying a permit as the result of a violation, (Pet.R.Br. App. 15-23)[6] the court adopted the Commonwealth's theory and instructed the jury:

> The allegations in this case are that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and also significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation of a hazardous waste facility.
>
> The question of fact for you to decide is. . . . was the violation or the alteration so substantial as

[6] The procedures and rules governing permit issuance, modification, revocation and reissuance were set forth in 25 Pa. Code §§ 75.259-75.282 (1986). The key provisions – 25 Pa. Code §§ 75.260, 75.278-75.280 were enacted on August 2, 1980, 10 Pa. B. 3163 (1980) and remained unaltered through the charging of Petitioner as well as his trial and conviction.

Although the Department of Environmental Resources had (and still has) some discretion on when or whether to revoke a permit (*see* 25 Pa. Code. §§ 75.278-75.279 (1986)), it must adhere to the specific procedures set forth in 25 Pa. Code § 75.280 (1986) if it chooses to issue, modify or revoke a permit. Under these procedures, if the Department wishes to revoke a permit for a violation, the Department must issue a notice of intent to revoke. *See id.* at § 75.280(o)(5). If the Department intends to modify or revoke a permit, it also must issue a draft permit. The draft permit is a type of temporary permit which includes such items as restrictions on activities and compliance dates. *See id.* at § 75.280(g)-(i) (Pet.R.Br. App. 3-13).

> part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit?

(Pet.R.Br. App. at 21 [Trial Transcript (2/18/86)]).

Despite *Scarpone's* burial of this theory, Respondents exhume it today. Although a person or entity may violate the terms of a SWMA permit, a revocation cannot occur automatically or *sua sponte*. Regulatory procedures require the DER to issue a notice of intent to revoke based upon violation of the permit. *See, e.g.*, 25 Pa. Code §§ 75.278-75.280 (1986). That did not occur here. Under the SWMA, regulations, and legal principles applicable at the time of the trial and conviction, Petitioner's violation of the permit could not constitute a revocation without official government action pursuant to established procedures. *Id.*

C. RESPONDENTS MISCHARACTERIZE THE HOLDING OF *SCARPONE*.

1. The Pennsylvania Supreme Court's *Scarpone* Decision Did Not Establish A "New Principle of Law."

Respondents contend that the *Scarpone* decision was a "new principle of law" for retroactivity purposes because it did not adopt the Superior Court's *Fiore* decision (R.Br. at 18-19, 24-28). They maintain that this Court is bound by the Superior Court's *Fiore* decision on direct appeal; rather than the Pennsylvania Supreme Court's decision in *Scarpone*. In support, Respondents cite *Brown v. Ohio*, 432 U.S. 161, 167 (1977), and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965), wherein the Court looked to the ruling of state intermediate appellate courts for an authoritative construction of state statutes.[7] Those cases do not stand for the proposition,

[7] The key to Respondents' position is their statement that this Court "d[oes] not limit itself" to pronouncements of state high courts in interpreting state statutes (R.Br. at 27). That is certainly true – when a state supreme court has not spoken on

as Respondents suggest, that the Court is bound by a state's intermediate decision in the face of a subsequent decision on the same issue by the highest court of the state. In each case, the state's highest court had *denied review*. Here, Pennsylvania's Supreme Court has spoken and its ruling should be followed.[8]

It is well-established that an unpublished memorandum opinion of the Superior Court of Pennsylvania (such as its *Fiore* decision) is not precedential or intended to be authoritative. *Commonwealth v. McPherson*, 533 A.2d 1060, 1062 (Pa.Super. 1987). *See also, Vetter v. Fun Footwear Co.*, 668 A.2d 529, 535 (Pa.Super. 1995) (*en banc*), appeal denied, 676 A.2d 1199 (Pa. 1996) (an unpublished memorandum has no precedential value); *see, also* Internal Operation Procedures of the Superior Court § 65.37 – Unpublished Memoranda Decisions, implementing Pa. R.A.P. 3501-3517. The Superior Court's unpublished *Fiore* decision had no bearing in Scarpone's case. The Commonwealth and Supreme Court's *Scarpone* decisions were the first published decisional statements about the section in question.

Respondents contend that *Scarpone* was a "new" rule in that it was not "foreshadowed" by previous case law (R.Br.

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an issue of state law, the decisions of intermediate appellate courts "is datum for ascertaining state law" which should not be disregarded unless a federal court "is convinced . . . that the highest court of the state would decide otherwise." *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237 (1940). This rule applies in habeas corpus cases. *E.g., Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988); *Olsen v. McFaul*, 843 F.2d 918, 929 (6th Cir. 1988). The *Scarpone* decision is of course convincing evidence that the Pennsylvania Supreme Court would not follow the lower courts' construction of section 401 of the SWMA in Petitioner's case, and thus it should not be followed by this Court.

[8] It recently has been reaffirmed that judicial construction of a statute by the Pennsylvania Supreme Court becomes part of the legislation from the time of the statute's enactment. *Commonwealth v. Shaffer*, 1999 WL 512138 (Pa., July 21, 1999).

at 25-26). They cite to wholly inapposite decisions interpreting the Clean Streams Law, a separate and distinct state environmental statute. Respondents submit that the Commonwealth Court's distinguishing of those cases (J.A. 108) proves that the *Scarpone* decision was not "foreshadowed." In reality, the Commonwealth Court quickly disposed of the Clean Streams Law cases as inapplicable and resolved *Scarpone* by application of the governing statutory language to the facts of that case (J.A. 108-110).

Furthermore, as discussed above in Section B-3, the *Scarpone* decision was mandated by the language of the statute and implementing regulations. A permit cannot be revoked without official government action in which the Department follows specified procedures. *See, e.g.*, 25 Pa. Code §§ 75.27ℰ 75.280 (Pet.R.Br. App. 3, Pet.R.Br. App. 13). The offense in question – 35 Pa. Cons. Stat. § 6018.401(a) – criminalizes operations of a hazardous waste facility without a permit. Under the applicable statutes and regulations, Petitioner had a permit that could not be revoked through his own actions. *Scarpone's* holding – that lack of a permit is an element of the crime in § 401 – was not a new principle of law. It was foreshadowed by the incontestably clear language of the statute and its regulations.

2. *Scarpone* Did Not Create A Defense; It Recognized That Not Having A Permit Was An Element Of The Offense.

In addition to claiming that *Scarpone* constitutes a new rule of law, Respondents and their Amici strain to characterize *Scarpone* as establishing an affirmative defense to the crime at issue (R.A.Br.[9] at 2, 5-6; R.Br. at 6-7). In so doing, Respondents would improperly shift the burden of proving each element of the offense to Petitioner. This would effectively constitute an independent deprivation of due process under the penal statute and was *not* the holding in *Scarpone*.

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[9] Respondents' Amici's Brief will be referred to hereafter as "R.A.Br."

See Martin v. Ohio, 480 U.S. 228, 231-236 (1987) (although burden of proving affirmative defenses can be placed on defendant, it is a due process violation to shift the burden of proving elements of offense to defendant). *Scarpone* held that the Commonwealth bore the burden of proving each element of the offense, and it failed to do so. Both *Scarpone* opinions were based on insufficiency of the evidence. The Pennsylvania Supreme Court did not suggest that Petitioner's possession of a permit constituted an affirmative defense. *Id.* at 1112 (J.A. 121) (upholding insufficiency of the evidence/due process attack on the conviction).

D. RESPONDENTS MISCONSTRUE *BOUSLEY*.

Respondents attempt to diminish this Court's recent ruling in *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604 (1998), by limiting that decision to one of retroactive application of a federal court's construction of federal law. *Bousley* rejected application of *Teague* procedural restrictions because Bousley's claim was not based on a new rule of procedure, but on a settled right. The Court aptly noted, "[t]he only constitutional claim made here is that petitioner's guilty plea was not knowing and intelligent. There is surely nothing new about this principle[.]" *Id.* at 1609. Likewise, the issues presented here are based on the settled right articulated in *Jackson v. Virginia* and the Due Process Clause.

Despite concerns with finality, this Court emphasized that even *Teague* provided an exception for individuals who are actually innocent as charged and recalled that *Teague* is founded on the notion that one of the "principle functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.' " *Bousley*, 118 S.Ct. at 1610 (citations omitted). "[I]t would be inconsistent with the doctrinal underpinnings of habeas review to preclude [Bousley] from relying on our decision in *Bailey v. United States*, 516 U.S. 137 (1995), in support of his claim that his guilty plea was constitutionally invalid." *Id.* at 1610. The Court did not indicate that Bousley's case would have been

decided differently if the ruling had concerned a state court judgment. Indeed, in *Bousley*, the Court cited *Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 477 U.S. 527 (1986), in support of the "actual innocence" exception to exhaustion. Both cases were brought under 28 U.S.C. § 2254 seeking collateral review of state court convictions.

Bousley cannot be ignored, as Respondents suggest, because it was a collateral attack on a federal conviction. *Bousley* must be regarded for its insight into the issue of an appeal involving basic constitutional error at the trial court level – involving guilt or innocence of the crime charged. As in *Bousley*, the instant record supports – indeed mandates – a finding of actual innocence as a matter of law.

E. RESPONDENTS ARE ATTEMPTING TO COMPENSATE FOR THE COMMONWEALTH'S MISTAKE IN CHARGING PETITIONER WITH THE WRONG OFFENSE.

Respondents cloud the issue by alluding that Petitioner's claim for federal habeas relief should be denied because Petitioner may have committed other environmental infractions (R.Br. at 1-4, 49).[10] They seek to convince this Court that although Petitioner may not have violated 35 Pa. Cons. Stat. § 6018.401(a), he probably violated some other provision; therefore, his incarceration should be upheld – on the basis of propensity. The argument is an unsubtle attempt to distract this Court with matter that has no proper bearing on the legal issue in the case. Respondents' request for a result-oriented decision must be ignored. Respondents have

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[10] For example, Petitioner was charged with and convicted of violating a misdemeanor, 35 P.S. § 6018.302(a), which prohibits processing or disposing of waste "in a manner which is contrary to . . . any permit or the terms and conditions of any permit or any order issued by the department." However, Respondents wish to see Petitioner convicted of 35 P.S. § 6018.401(a), because it is a felony charge which carries a longer sentence.

spent over a decade trying to uphold Petitioner's conviction and incarceration because the prosecution erred at the outset by incorrectly charging Petitioner.

Petitioner need not address Respondents' suggestion that his actions could have made him culpable under another environmental section. *Scarpone* reversed that conviction despite its recognition that other charges may have been "appropriate."

> A more appropriate charge may have been brought under alternative provisions of the statute, viz, 35 Pa. Cons. Stat. §§ 6018.606(g) and 6018.601. . . . But to conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse . . . [T]he statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection.

Scarpone, 634 A.2d at 1112 (J.A. 121).

In so ruling, *Scarpone* vindicated a key tenet of criminal justice. An individual cannot be convicted of violating one law because the government believes that he committed the elements of a different offense.[11] The *Winship* reasonable doubt requirement is not " 'limit[ed] to those facts which, if not proved, would wholly exonerate' " petitioner. *Jackson v. Virginia*, 443 U.S. at 324, *quoting*, *Mullaney v. Wilbur*, 421 U.S. 684, 697-698 (1975). In evaluating whether or not the government met its burden, this Court should look solely at facts that relate to Petitioner's alleged violation of 35 Pa. Cons.

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[11] In Respondents' zeal to divert this Court's attention from the issues at hand, they refer to Petitioner's prior conduct and criminal record although both are outside the record and irrelevant to the instant case. *See, e.g.*, R.Br. at 1 n.1, 1-4. Such an attempt cannot be justified. A cornerstone of justice is that a defendant cannot be convicted because he is a *bad person* or because he has committed other "crimes, wrongs or [bad] acts." *See, e.g.*, Fed. R. Evid. 404(b). Petitioner requests that this Court dismiss Respondents' thrust in this regard.

Stat. § 6018.401(a). As this Court has noted "[u]nder our criminal justice system even a thief is entitled to complain that he has been unconstitutionally imprisoned as a burglar." *Jackson*, 443 U.S. at 323-324. Regrettably, Respondents seek to wash away bedrock due process protections and careful retroactivity analysis because of their flawed charging of Petitioner.[12]

CONCLUSION

This case presents a unique and egregious deprivation of constitutional rights. Contrary to Respondents' view, granting relief would not create a sea change. As Respondents' Amici aptly concede:

> Admittedly, the adverse effect on finality in this particular case would not be substantial. It appears that only one finally decided conviction would be affected.

(R.A.Br. at 17; *see also id.* at 12 n.2). But validating the Commonwealth's position would have oppressive implications. If a prosecutor's fictional construct, however well-

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[12] Relying upon *Herrera v. Collins*, 506 U.S. 390 (1993), Respondents suggest the option of clemency (R.Br. at 21). However, *Herrera* held that actual innocence claims based solely upon newly discovered evidence do not establish a constitutional violation that can ground a habeas petition. *Id.* at 400. But, Petitioner's innocence claim rests upon an independent *Jackson v. Virginia* constitutional issue that arises out of the record.

Also, in *Herrera*, the Court did not hold, as Respondents suggest, that if clemency is an option the Court need not weigh a federal habeas corpus petition. The existence of alternative, discretionary relief is irrelevant to the determination of this case. As Justice Souter recently reiterated in a concurring opinion, state prisoners "do not have to invoke extraordinary remedies" such as a clemency to satisfy federal habeas exhaustion requirements. *O'Sullivan v. Boerckel*, ___ U.S. ___, 119 S. Ct. 1728, 1735 (1999) [citations omitted].

intended, can substitute for real proof, of real elements, with real notice, then the government is freer and the individual more at risk.

For the foregoing reasons, the decision of the Third Circuit should be reversed and the District Court's granting of Petitioner's federal habeas relief should be reinstated.

Respectfully submitted,

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Title 25

ENVIRONMENTAL RESOURCES

Ch. 75 SOLID WASTE MANAGEMENT

Subchapter D. HAZARDOUS WASTE

Sec.

75.259. Scope.

75.260. Definitions and requests for determinations.

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75.263. Transporters of hazardous waste.

75.264. New and existing hazardous waste management facilities applying for a permit.

75.265. Interim status standards for hazardous waste management facilities and permit program for new and existing hazardous waste management facilities.

75.266. [Reserved].

75.267. Notification of hazardous waste activities.

75.270. The hazardous waste permit program.

75.271. Exclusions from permit requirements.

75.272. Interim status facilities.

75.273. General application requirements.

75.274. Contents of Part A permit applications.

75.275. Standard conditions for permits.

75.276. Requirements for recording and reporting of monitoring results.

75.277. Schedules of compliance.

75.278. Causes for permit modifications or revocation and reissuance.

75.279. Revocation of permits.

75.280. Procedures for permit issuance, modification, revocation and reissuance, or revocation.

75.281. Public notice and comment requirements.

75.282. Public hearings.

Authority

The provisions of this Subchapter D issued under act of July 7, 1980 (P.L. 380, No. 97) (35 P.S. §§ 6018.101 – 6018.1003), unless otherwise noted.

Source

The provisions of this subchapter D added August 2, 1980, 10 Pa.B. 3163, unless otherwise noted.

* * *

§ 75.260. Definitions and requests for determinations.

(a) *Definitions.* The following words and terms when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

* * *

Act – The Solid Waste Management Act (35 P.S. §§ 6018.101 – 6018.1003).

* * *

Permit – A written document issued by the Department under the act which authorizes the recipient to undertake the treatment storage or disposal of hazardous waste under the act. The term does not include interim status or a permit which has not yet been the subject of final Department action, such as a draft permit or a proposed permit.

* * *

Source

The provisions of this § 75.260 adopted November 28, 1980, effective November 18, 1980, 10 Pa.B. 4505; amended through September 13, 1985, effective September 14, 1985, 15 Pa.B. 3289.

* * *

§ 75.278. Causes for permit modification or revocation and reissuance.

(a) The Department may modify, or alternatively revoke and reissue a permit for cause which includes, but is not limited to the following:

(1) If a circumstance set forth in § 75.279 (relating to revocation of permits) exists and the Department determines that modification, or revocation and reissuance is appropriate.

(2) If the Department has received information which was not available at the time of permit issuance and would have justified the application of different permit conditions at the time of issuance.

(3) If the standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations.

(4) If the Department determines good cause exits for changing a compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy.

(5) If the permittee fails to comply with Subchapter E (relating to financial responsibility requirements for hazardous waste, storage, treatment and disposal facilities).

(b) The Department may also modify a permit in the following instances:

(1) When modification of a closure plan is authorized under § 75.264(o)(4) or (17) (relating to new and existing hazardous waste management facilities applying for a permit).

(2) When necessary to include conditions applicable to a facility that were not previously included in the facility's permit.

(3) When the Department: receives the notification of the expected closure date under § 75.264(o)(5); determines that extension of the 90 to 180 day period under § 75.264(o)(6) and (7), modification of the 30-year postclosure period under § 75.264(o)(10), continuation of security requirements under § 75.264(o)(13), or permission to disturb the integrity of the containment system under § 75.264(o)(14), is unwarranted.

(4) When the permittee has filed a request under § 75.332(f) (relating to insurance coverage) for a variance to the level of financial responsibility or when the Department demonstrates under § 75.322(b) that an upward adjustment to the level of financial responsibility is required.

(5) When necessary to include conditions applicable to the groundwater detection, assessment, and abatement programs required by § 75.264(n).

(6) When a land treatment unit is not achieving complete treatment of hazardous constituents under its current permit conditions.

(c) The Department may also modify a permit without following the procedures under § 75.280 (relating to procedures for permit issuance, modification, revocation and reissuance, or revocation) where:

(1) The modification is considered a minor modification. Minor modifications are changes to the during or operation of a facility for which the Department determines that no actual change to the permit is needed. The changes shall only include the following:

(i) Typographical errors.

(ii) Monitoring or reporting changes on a more frequent basis.

(iii) Interim compliance date changes in compliance schedules that are not more than 120 days after the date specified in the existing permit and do not interfere with attainment of the final compliance date requirement.

(iv) Emergency coordinator or equipment list changes in the permit's contingency plan.

(v) Maximum inventory estimate changes.

(vi) Changes that the Department determines are minor, are consistent with and no less stringent than modifications listed in 40 C.F.R. § 270.42(g) – (n) (relating to minor modifications of permits) and will enhance or improve the treatment, storage, or disposal operation at the facility.

(2) The modification is approved in writing by the Department.

§ 75.279. Revocation of permits.

(a) The Department may revoke a permit at any time or deny a permit renewal application for cause, including, but not limited to, the following cases:

(1) Noncompliance by the permittee with a provision of the act, this subchapter or a condition of the permit.

(2) The permittee's misrepresentation or failure in the application or during the permit issuance process to disclose fully a relevant fact or the permittee's misrepresentation or nondisclosure of a relevant fact.

(3) A determination by the Department that the permitted activity or facility endangers human health or the environment.

(4) Another reason authorized under the act or this subchapter.

(b) The Department will follow the applicable procedures in § 75.280 (relating to procedures for permit issuance, modification, revocation and reissuance, and revocation) in revoking a permit.

§ 75.280. Procedures for permit issuance, modification, revocation and reissuance or revocation.

(a) A person who requires a permit under the hazardous waste program shall complete, sign, and submit to the Department an application for a hazardous waste permit.

(b) The Department will not begin the processing of a permit until the applicant has complied with the application requirements for that permit and complied with the signature and certification requirements of § 75.265(z)(13) (relating to interim status standards for hazardous waste management facilities and permit program for reward existing hazardous waste management facilities).

(c) The Department will review for completeness every hazardous waste permit application for a new or existing HWM facility – both Parts A and B of the application. Upon completing the review, the Department will notify the applicant is writing whether the application is complete. If the application is incomplete, the Department will list the information necessary to make the application complete. When the application is for an existing HWM facility, the Department will specify in the notice of deficiency a date for submitting the necessary

information. If the applicant thereafter submits a complete application, the Department will notify the applicant that the application is complete. After the application is completed, the Department may request additional information from an applicant if necessary to clarify, modify, or supplement previously submitted material. Requests for additional information will not render an application incomplete.

(d) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under applicable statutory provisions.

(e) If the Department decides that a site visit is necessary in conjunction with the processing of an application, it will notify the applicant. The applicant shall provide the Department access for a site visit at a reasonable time.

(f) The effective date of an application is the date on which the Department notifies the applicant that the application is complete as provided in subsection (c).

(g) Once an application is complete, the Department will tentatively decide whether to prepare a draft permit or to deny the application.

(h) If the Department tentatively decides to deny the permit application, it will issue a notice of intent to deny the application. A notice of intent to deny the permit application is a type of draft permit which follows the same procedures as a draft permit prepared under this section. If, after issuing a notice of intent to deny, the Department's final decision is to issue the permit, the

notice of intent to deny will be withdrawn and the Department will proceed to prepare a draft permit under subsection (i).

(i) A draft permit prepared by the Department will contain the following information:

(1) Conditions under § 75.275 (relating to standard conditions for permits).

(2) Proposed compliance schedules under § 75.277 (relating to schedules of compliance).

(3) Monitoring requirements under §§ 75.264 (relating to new and existing hazardous waste management facilities applying for a permit). 75.265(z), and 75.276 (relating to requirements for recording and reporting of monitoring results).

(4) Hazardous waste permit standards for treatment, storage, and disposal and other permit conditions under § 75.275.

(j) A draft permit prepared under this section shall be accompanied by a statement of basis, under subsection (k) or a fact sheet under subsection (l), publicly noticed under § 75.281 (relating to public notice and comment requirements) and made available for public comment under § 75.282 (relating to public hearings). The Department will give notice of the opportunity for a public hearing under § 75.282 and respond to comments under subsection (m).

(k) The Department will prepare a statement of basis for every draft permit for which a fact sheet under subsection (1) is not prepared. The statement of basis will briefly describe the derivation of the conditions of the

draft permit and the reasons for them or, in the case of notices of intent to deny or revoke, reasons supporting the tentative decision. The statement of basis will be sent to the applicant and, on request, to other persons.

(l) Preparation of fact sheets shall comply with the following:

(1) A fact sheet will be prepared by the Department for every draft permit for a major HWM facility or activity, and for every draft permit which the Department determines is the subject of widespread public interest or raise major issues. The fact sheet will briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The Department will send this fact sheet to the applicant and, on request, to other persons.

(2) The fact sheet shall include the following when applicable:

(i) A brief description of the type of facility or activity which is the subject of the draft permit.

(ii) The type and quantity of wastes which are proposed to be or are being treated, stored, or disposed of.

(iii) A brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions.

(iv) Reasons why requested variances or alternatives to required standards do or do not appear justified.

(v) a description of the procedures for reaching a final decision on the draft permit including the following:

(A) The beginning and ending dates of the comment period under § 75.281 and the address where comments will be received.

(B) Procedures for requesting a hearing and the nature of that hearing.

(C) Other procedures by which the public may participate in the final decision.

(vi) The name and telephone number of a person to contact for additional information.

(m) At the time that a final permit is issued, the Department will also issue a response to comments. The response will state the following:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decisions, and the reasons for the change.

(2) Briefly describe the response to significant comments on the draft permit raised during the public comment period or during a hearing.

(n) The Department will make available to the public its response to public comments.

(o) The Department will follow the following procedures if it modifies, revokes and reissues, or revokes a permit:

(1) The Department may modify, revoke and reissue, or revoke a permit either at the request of an interested person – including the permittee – or upon the Department's initiative for reasons specified under § 75.278 (relating to causes for permit modification or revocation and reissuance) or § 75.279 (relating to revocation of permits) and for a reason authorized under the act, this subchapter or the terms and conditions of the permit. A request shall be in writing and contain facts or reasons supporting the request.

(2) If the Department decides the request is not justified, the Department will send a brief written response giving a reason for the decision to the requestor. The Department's refusal to modify, revoke and reissue, or revoke a permit pursuant to a request is not subject to public notice, comment, or hearings.

(3) If the Department tentatively decides to modify or revoke and reissue a permit, under § 75.278 (a) and (b), it will prepare a draft permit under subsections (g) – (i) incorporating the proposed changes. The Department may request additional information from the permittee and may require the permittee to submit an updated permit application. In the case of revoked and reissued permits the Department will require the submission of a new application. The permittee shall submit additional information or an updated or new application under a request by the Department within the time specified by the Department.

(4) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is

prepared. Other aspects of the existing permit shall remain in effect for the duration of the permit. When the permit is revoked and reissued, the entire permit is reopened just as if the permit had expired and was being reissued. During a revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is issued.

(5) If the Department tentatively decides to revoke a permit under § 75.279 it will issue a notice of intent to revoke. A notice of intent to revoke is a type of draft permit which follows the same procedures as a draft permit prepared under subsections (g) – (i).

(6) Minor modifications § 75.278 are not subject to the requirements of this section.

* * *

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM FIORE — CRIMINAL DIVISION

vs. — No. CC 8508740

DAVID SCARPONE — No. 8508741

Trial Transcript

Filed by:

Staney A. Pacyna
Official Court Reporter

Trial Date:

February 18, 1986

TRIAL JUDGE:

HON. RAYMOND A. WOVAK
and JURY

COUNSEL OF RECORD

FOR THE COMMONWEALTH:

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For Defendant WILLIAM FIORE:

ROBERT P. GING, JR., ESQ.,

FOR DEFENDANT
DAVID SCARPONE:

ROBERT J. AMELIO, ESQ.,

[p. 2] (In Chambers, Tuesday, February 18, 1986,
at 10:15 a.m. o'clock, with counsel)

THE COURT: We are on the record with question No. 4. The Jury's question is as follows:

"By law, does a permit violation automatically revocate" – that is the Jury's word – " – or suspend that permit, or must it be worded so in the permit?"

All parties have agreed that the answer to the first section of the jury's question is no. And I believe all parties are in agreement that the answer to the jury's second question is no, although I'll –

MR. GING: – no, your Honor. I am not in agreement with that.

THE COURT: We have discussed this matter ad longe et latum. Therefore, the Court will have to make a ruling.

The purpose of this hearing is to [p. 3] perfect the record as to the position of the parties with regard to what is before it.

Why don't we begin with Mr. Welks.

MR. WELKS: As to the second part of the jury's question, the Commonwealth believes that there is no requirement in law that every method by which a permit can be violated be stated in the permit. That it would be humanly impossible to list every possible violation.

It's the Commonwealth's position that the permit authorizes the conduct that is contemplated in the permit application and the permit narrative and anything beyond that is outside the permit and is without a permit.

Consequently, the Commonwealth believes, in order to clarify and give the jury proper understanding as in this particular context, the Court needs to have, after providing short responses to specific questions from the jury, explain that the law is that to change the [p. 4] permit for that facility in terms of the original permit for that facility, then operation of that activity, subsequent to that, can be found to be without a permit because it is not activity or operation contemplated by issuance of a permit and that the question for the jury is whether or not it changes or alterations are sufficiently significant that the subsequent activity is without a permit.

MR. GING: May it please the Court. Your Honor, we have discussed this matter now with the Court for at least a half hour and advise the Court of the arguments that we are making at this point in time.

My initial objection to the Court's answer is that the second part of the question is or does not ask whether or not a violation automatically becomes a revocation of the permit. That's something that the Court feels is in the question and is willing to respond to. So I am objecting to the Court responding to that.

[p. 5] My reading of the question is that the jury wants to know if an automatic revocation of a permit must be found in the language of the permit. That's all the question means.

The Court's theory, not advanced by the Commonwealth, is that an action undertaken by persons holding a permit can be so severe as to become an automatic revocation of that permit.

MR. WELKS: No.

THE COURT: I'm just saying now out of disagreement, I want you to continue making your argument.

MR. GING: We have advised both Court and counsel, it's our feeling that Section 503 of the Solid Waste Management Act provides specifically what has to be done to revoke, to suspend or to modify a permit as the result of a violation.

We also advised the Court that Section 1917(a) and 1921(a) of the Administrative Code provide that no permit can be revoked, suspended or modified with-[p. 6] out the opportunity to appeal to the Environmental Board.

If the Court charges, as it plans with respect to the second part of the question, it's our feeling that it will not only be answering a question not asked by the jury, but it will be making an improper ruling as to the law and also calling attention to the fact that the Commonwealth's facts of the violation at a point in time where the jury is now or has been deliberating since 9:30 or ten minutes to 10:00 yesterday morning.

It's our contention, your Honor, that to instruct the jury according to the Court at this time, at this point in time will have the effect of a directed verdict against Mr. Fiore, with respect to count one.

MR. AMELIO: Your Honor, with respect to Mr. Scarpone, I would join in with Mr. Ging's argument with respect to what he has just related regarding revocation of the permit.

However, with respect to Mr. Scarpone, the question, and I think the [p. 7] Court even commented upon this, arises and raises a question about permit. We don't know whether or not the jury is asking the Court in the context of alterations or if they're asking their question in the context of wrongful disposal of terne line skimmings.

Now the arguments that have been expressed thus far have spoken to the concept of alterations. And as I understand the Commonwealth's theory, those alterations were such that they were clearly beyond the pale of the four corners of the permit. And, therefore, one should conclude there was no permit.

The difficulty that I have in that approach is that the allegata is that there was no permit. In fact, there is a permit, and that is the problem. So now, they are looking for ways to circumvent that.

Secondly, with respect to terne line skimmings, that charge will so prejudice the jury because they viewed the dumping of the terne line skimmings into Pit No. 1. [p. 8] I'm sorry, into the disposal pit as opposed to Pit No. 1 perhaps as constituting an automatic violation of the permit. And, therefore, there is no permit. The underlying factual controversy here – I think all of us agree we need to look at the alterations aspect of the complaint, criminal information – different from the charges relating to terne line skimmings.

I believe that the fairest thing to do would simply address those two questions that have been asked and to wait and see if that clarifies it in the minds of the jury.

This jury has demonstrated, on numerous occasions, it has been sophisticated, very conscientious, and for us to assume a position or to amend their question is just simply wrong.

We can clarify this issue by simply responding on the narrowest grounds possible; and that isn't to say, your Honor, with the idea of obfuscating the situation, but I simply suggest to you that, are you [p. 9] then going to consider – if you bring them down and give another explanation to them, are you going to distinguish between alterations and disposal of terne line skimmings, because if you don't, I think we are again building an error into the case?

THE COURT: It would be the Commonwealth's theory that the allegatas are such that the same allegations are that Mr. Fiore operated the facility without a permit pertains to both the terne line skimmings and the modification, 810. There is an allegation of disposal of hazardous waste without a permit under both scenarios.

Is that correct?

MR. WELKS: The first scenario operated hazardous waste without a permit, and then it has Counts 2, 3 and 4, discharge through the valve without a permit. Then according to the Crimes Code 7 and 8 are allegations that he disposed of hazardous waste without a permit.

The same theory in fact applies, [p. 10] which is that you're given a permit to do a specific thing and if you do something outside of that, you're doing it without a permit. Just as the Court indicated, Mr. Fiore has a permit

to use the Phase I Pit. That certainly does not give him a permit to dump materials in his backyard. If he disposed his materials in his backyard, he did that without a permit.

THE COURT: Well, let's bring, the jury down.

(End of chamber conference)

(In open court with the jury present)

THE COURT: Ladies and Gentlemen of the Jury: Your question is an indication to counsel and the court of the diligence with which you apply yourself to your responsibility. Your question focuses on a very intricate legal issue which is involved in this case, and we are not surprised that you focused on that issue in view of your application to your responsibility.

Your question is in two parts. [p. 11] The first part asks, "By law, does a permit violation automatically revocate or suspend that permit?" The answer to that question is no. The second part of the question is: "Or must it be worded so in the permit?" The answer to that question is that it is not necessary that a permit as a matter of law specify all the ways in which it may be violated and thereby revoked. It does not have to specify the ways in which it may be violated or revoked.

In order to help you understand the allegations, I would like to amplify those answers.

Clearly, the MIDC facility had a permit to operate a hazardous waste facility. You know that's been made clear during the course of the case. And, as a matter of law, every violation of the conditions of that permit would not result. There is a way in which violations are

handed. In fact, you heard testimony with regard to violations and the way those vio-[p. 12] lations were handed.

The allegations in this case are that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation of a hazardous waste facility.

The question of fact for you to decide is, on what testimony will you hang your hat. In other words, whom you believe and whom you do not believe.

Secondly, was the violation or the alteration so substantial as part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit?

These are questions of fact for you to answer.

I hope that gives you some better understanding of the law and will help you reach a verdict in this matter.

You may return to deliberate. (Jury retires to deliberate on a verdict)

[p. 13] MR. GING: May we approach side bar?

THE COURT: Yes.

(At side bar)

MR. GING: I would like to ask the Court, since the Court was willing to go over the Commonwealth's allegations with this jury at the point where they have

been out since yesterday, to go over Mr. Fiore's allegations as to why he wasn't operating without a permit, which was the fact that it's the same identical water that came out of 810 before. That he was also permitted by DER, in fact, to discharge that same water from that same location.

I think that since the Court has drawn such great attention to the Commonwealth's position by going over what the Commonwealth's allegations of the case are, when during the Court's charge the Court didn't go over what the allegations are of each party – if the jury is compelled, I submit they will be back immediately with a verdict on that count. I would like to see [p. 14] Mr. Fiore's allegations as to why he didn't violate the permit put before the jury at this point in time so that the Court will not have drawn attentio[n] solely to the Commonwealth's allegations at this lat[e] point in the trial.

THE COURT: Do you want to comment?

MR. AMELIO: In recounting the Court's view of where we are in this case, the words that I understood you to say were – where the deviation in the alteration so significantly departed in terms of the permit – I submit to your Honor that no such words appeared in any prima facie element of any case that's before this Court. And you're injecting into the case other elements which, as I said, did not form the basis of any criminal information, nor was any such theory recently announced the subject of any preliminary hearing. Moreover, since the Court failed to instruct on terne line skimmings, the jury now will be left to speculate as to whether or not that constituted conduct that was beyond the [p. 15] four corners of

Mr. Fiore's permit. I believe that coming in at this stage as it has come in the trial of this matter that the instructions will so prejudice the jury to conclude that Mr. Fiore should have a separate permit. That is grounds for a mistrial, and I would ask for it at this time.

MR. GING: We would also join in the motion for a mistrial.

THE COURT: I might grant it.

MR. GING: I think that would be appropriate.

THE COURT: That motion is denied.

Mr. Welks, do you want to make any comment?

MR. WELKS: The theory is not new. The Commonwealth is not obligated to plead its legal theory to the jury. The purpose of the charge is not only to give legal theories that the Court just did, but I think if Mr. Ging wished other materials to be brought to the jury, he could have done so and –

[p. 16] THE COURT: – it was not the Court's intention to explain to the jury the Commonwealth's theory of the case.

The Court's intention was to clarify the allegations against the defense in a very intricate and frankly, new area of law. To the extent there is disagreement that is such of which trials are made – the Court has made a decision as to what the law is to the best of its ability and to the extent that it has coincided with the

Commonwealth's theory of the case, that should happen to be the way the cookie crumbles on this particular question.

(End of side bar)

Supreme Court, U.S.
FILED
MAY 13 1999
CLERK

(6)

No. 98-942

IN THE

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

At a single trial and on the same facts, petitioner and his employee co-defendant were convicted under Pennsylvania law of disposing of environmental waste without a permit. After petitioner's conviction was affirmed by a Pennsylvania intermediate appellate court and discretionary review was denied by the Pennsylvania Supreme Court, his co-defendant's conviction was reversed by the Pennsylvania Supreme Court because the state had not proved lack of a permit, an essential element of the crime charged.

1. In ascertaining the elements of a state criminal offense so as to test the sufficiency of the trial evidence under the Due Process Clause, must a federal habeas court disregard the authoritative construction of the elements by the state supreme court because of retroactivity concerns, when the state supreme court's ruling was based on plain statutory language?

2. In examining the sufficiency of the trial evidence on collateral review, is a federal court bound by a decision of a state's intermediate appellate court that infringed upon a petitioner's due process right to notice that his conduct was criminal?

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INTERESTS OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958. NACDL presently enjoys a membership of more than 10,000 attorneys. NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure. Consequently, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives are to ensure the proper administration of criminal justice and to promote proper application of federal habeas corpus law to correct the injustice that occurs when a person who is not guilty is convicted in state court.

SUMMARY OF ARGUMENT

Petitioner Fiore's conviction and continued incarceration for felonious violation of Pennsylvania's Solid Waste Management Act ("SWMA"), PA. STAT. ANN. tit. 35, § 6018 (West 1993), constitutes a textbook violation of the Due Process Clause of the Fourteenth Amendment. Fiore was charged and convicted under section 401 of the SWMA which prohibits the "storage, transportation, treatment, or disposal" of hazardous waste "unless [a] person . . . has first obtained a permit." *Id.* § 401, PA. STAT. ANN. tit. 35, § 6018.401. Violation of this provision is a second degree felony, punishable by imprisonment of "not less than two but not more than ten years." *Id.* § 606(f), PA. STAT. ANN. tit. 35, § 6018.606(f). At trial and through numerous levels of review, the Commonwealth conceded that Fiore possessed a permit to

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that no party other than counsel for *amicus* authored this brief in whole or in part, and no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief. The petitioner and respondents have consented to the filing of this brief, and *amicus* has filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

dispose of waste. Contrary to the plain language of the statute, the Commonwealth's theory of prosecution was that Fiore so egregiously violated the conditions of the permit that the permit constructively was rendered void. No statute or regulation supported the Commonwealth's view. Fiore was also convicted under section 302(a), the seemingly appropriate charge for his conduct, which prohibits processing or disposing of waste "in a manner which is contrary to . . . any permit or to the terms and conditions of any permit or any order issued by the department." *Id.* § 302(a), PA. STAT. ANN. tit. 35, § 6018.302(a). Violation of section 302(a) is not a felony but a misdemeanor punishable by imprisonment of up to one year. The Commonwealth's felony prosecution of Fiore, based on its novel interpretation of the felony provisions of the SWMA, violated his due process right to have every element of the charge against him proved beyond a reasonable doubt; moreover, the Pennsylvania courts' affirmance of his felony conviction unforeseeably expanded a plainly worded and relatively narrow criminal statute, violating Fiore's rights under the Constitution's Due Process Clause.

The Pennsylvania Supreme Court, ruling on the appeal of Fiore's co-defendant Scarpone, rejected the Commonwealth's theory of prosecution and held that lack of a permit is an essential element of the crime defined by section 401. (J.A. 121.)[2] Following the holding in *Commonwealth v. Scarpone*, Fiore moved for and was denied post-conviction relief. The Commonwealth Court affirmed the denial, holding that the issues raised in Fiore's petition had already been litigated on direct appeal and that, under state law, the *Scarpone* decision could not be applied retroactively to Fiore's state collateral attack on his conviction. (J.A. 141.)[3] Fiore moved for federal habeas relief,

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[2] This opinion is reported at 634 A.2d 1109 (Pa. 1993). The Commonwealth Court's decision is reported at 596 A.2d 892 (Pa. Commw. Ct. 1991). For the convenience of the Court, *amicus* will cite in this brief only to the appendices submitted by the parties.

[3] This decision is reported at 665 A.2d 1185 (Pa. Super. Ct. 1995), *all. app. denied*, 675 A.2d 1243 (Pa. 1996).

which was granted by the United States District Court for the Western District of Pennsylvania because Fiore was convicted based on an interpretation of a statute that the Pennsylvania Supreme Court had determined to be improper. (Pet. for Writ of Cert., Apps. D-E.) The Third Circuit reversed, analyzing Fiore's petition not as a due process claim, but as a request to apply the *Scarpone* decision – which it held created a new law – retroactively. Relying on *Teague v. Lane*, 489 U.S. 288 (1989), and the principle that "the federal constitution has no voice on the subject of retroactivity," the Third Circuit held that Fiore's conviction could not be overturned. (Pet. for Writ of Cert., App. A.)[4]

In resolving a challenge to sufficiency of the evidence on collateral review, a federal court must determine whether a rational juror could find that each element of the offense was proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 314-18 (1979). The plain language of section 401 of the SWMA, the felony provision under which Fiore was convicted, required the Commonwealth of Pennsylvania to prove that Fiore lacked a permit to dispose of environmental waste. The Pennsylvania Supreme Court so held in *Scarpone*. The holding in *Scarpone* is the authoritative state court construction of the elements of the state offense – binding on federal courts on collateral review.

No retroactivity concerns, whether governed by rules of statutory interpretation or by *Teague v. Lane*, are raised by this Court's adherence to the holding in *Commonwealth v. Scarpone*. As a matter of Pennsylvania law, the *Scarpone* ruling constituted a judicial articulation of what section 401 has always meant. The decision was dictated by Pennsylvania rules of statutory construction and fundamental concepts of the due process right to notice of conduct the state deems criminal. It cannot, in any meaningful sense, be considered "new law" subject to retroactivity analysis. No federalism

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[4] This decision is reported at 149 F.3d 221 (3d Cir. 1998).

concerns would be infringed by this Court's application of the holding in *Scarpone* to ascertain whether Fiore's conviction was constitutional.

Rejecting application of the holding of *Commonwealth v. Scarpone* would require this Court to adopt a reading of section 401 that was soundly rejected by Pennsylvania's highest court and which would impermissibly expand the statute beyond its plain language. A federal court should not, in applying the sufficiency standard of *Jackson v. Virginia*, adopt an unconstitutionally broad reading to permit punishment for conduct no reasonable person would have thought covered by the state statute.

ARGUMENT

I. PETITIONER WAS DENIED DUE PROCESS BECAUSE THE COMMONWEALTH FAILED TO PRESENT ANY EVIDENCE THAT HE LACKED A PERMIT TO DISPOSE OF WASTE, AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

It is a "bedrock[,] axiomatic, and elementary" constitutional principle that the Due Process Clause of the Fourteenth Amendment protects the accused "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 363-64 (1970) (internal quotation omitted). Fiore and his employee co-defendant were charged with disposing of waste without having "first obtained a permit." SWMA § 401, PA. STAT. ANN. tit. 35, § 6018.401 (West 1993). It therefore was incumbent upon the Commonwealth to prove, beyond a reasonable doubt, that they in fact did not possess a permit when they engaged in the conduct charged in the indictment. Here, there is no dispute that the Commonwealth failed to prove that the defendants lacked a permit. It presented no evidence on the point; instead the Commonwealth argued that the defendants' conduct constructively voided their permit so that *as a matter of law, not of fact*, they did not have a "permit." Regardless of the prospective merit of such a

theory under Pennsylvania law, it is nowhere contained in the plain language of the statute. In the co-defendant's case, the Pennsylvania Supreme Court so held. A contrary interpretation cannot be applied constitutionally on the identical facts to Fiore's conduct.

Standing alone, the "no evidence" doctrine announced almost forty years ago by this Court in *Thompson v. City of Louisville*, 362 U.S. 199, 204 (1960), would be sufficient to require that Fiore be granted a writ of habeas corpus. But *Thompson* does not stand alone. The contours of the "elemental . . . due process right[]" to be free "from wholly arbitrary deprivation of liberty" were expanded some twenty years ago when the Court announced the now-familiar guarantee that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 314-16 (1979); *accord Wright v. West*, 505 U.S. 277, 290 (1992) (under *Jackson* "a conviction violates due process if . . . 'no rational trier of fact could find guilt beyond a reasonable doubt'" from the evidence adduced at trial (quoting 443 U.S. at 317)); *see also Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam) ("It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a critical element of the offense charged . . . violate(s) due process." (internal quotation omitted, ellipsis in original)); *Johnson v. Florida*, 391 U.S. 596, 598-99 (1968) (per curiam). Federal courts are charged with protection of this fundamental right: "A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim." *Jackson*, 443 U.S. at 322.

Jackson provides that the sufficiency of the evidence standard be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16. Federal courts are bound by authoritative state court pronouncements on the meaning of the state's own statutes:

"Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *accord Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts."); *Garner v. Louisiana*, 368 U.S. 157, 166 (1961) ("We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court.").

A. By Its Plain Meaning and as Interpreted by the Pennsylvania Supreme Court, Section 401 of the SWMA Has Always Required the Commonwealth to Prove Lack of a Permit to Sustain a Felony Conviction.

Section 401 of Pennsylvania's SWMA provides that "no person ... shall store, transport, treat, or dispose of hazardous waste within this Commonwealth ... unless such person ... has first obtained a permit." SWMA § 401, PA. STAT. ANN. tit. 35, § 6018.401. By its very terms, this section requires proof that a person has not obtained a permit. *Cf. Commonwealth v. McNeil*, 337 A.2d 840, 843 (Pa. 1975) (under statute that prohibited carrying a concealed firearm "without a license," "the absence of a license is an essential element of the crime").

The plain meaning of section 401 was recognized by the Supreme Court of Pennsylvania and adopted as its proper construction in the *Scarpone* decision, which overturned the conviction of Fiore's co-defendant. The court reasoned that Scarpone could not be convicted of operating a waste disposal facility without a permit because, "simply put Mr. Scarpone did have a permit." (J.A. 121.) The court unequivocally stated that "the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection" and refused to endorse the

"bald fiction" that violation of a permit was tantamount to not having one. (J.A.122.)[5]

Under well established Pennsylvania doctrine, the Pennsylvania Supreme Court's ruling did not assign new meaning to the statute but rather served as an explication of what the statute had meant from the time of its enactment. The Supreme Court of Pennsylvania has adhered to this principle for half a century or more. "The general precept in Pennsylvania is that 'the construction placed upon a statute by the courts becomes a part of the act, from the very beginning.'" *Ettinger v. Central Penn Nat'l Bank*, 634 F.2d 120, 124 (3d Cir. 1980) (quoting *Buradus v. General Cement Products Co.*, 48 A.2d 883, 885 (Pa. Super. Ct. 1946), *aff'd and adopted*, 52 A.2d 205 (Pa. 1947) (per curiam)). Justice Stevens recognized this same doctrine last Term in a case applying an identical rule to this Court's construction of a federal statute: "'A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" *Bousley v. United States*, 523 U.S. 614, —, 118 S. Ct. 1604, 1612 (1998) (Stevens, J., concurring in part and dissenting in part) (holding in *Bailey v. United States*, 516 U.S. 137 (1995), explained what 18 U.S.C. § 924(c) had always meant) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)).

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[5] Habeas relief is therefore appropriate because the Pennsylvania lower court decisions denying Fiore's *Jackson v. Virginia* claim were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (1994 & Supp. III). Ambiguities that may exist in other cases with respect to the meaning of that provision of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") are not in issue. *See Williams v. Taylor*, 163 F.3d 860, 865-66 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1355 (1999) (No. 98-8384). The AEDPA applies because the federal petition was filed in June 1996, after the AEDPA's April 24, 1996, effective date. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

As applied to Fiore's habeas petition, the proposition that section 401 has always meant what the Pennsylvania Supreme Court made explicit in *Scarpone* is uncontroversial, as it is undisputed that the construction articulated in *Scarpone* was the first authoritative pronouncement of the meaning of the phrase "unless such person . . . has first obtained a permit." SWMA § 401, PA. STAT. ANN. tit. 35, § 6018.401. The Pennsylvania Supreme Court overruled no contrary prior precedent in *Scarpone*, and no decision prior to the prosecution of Scarpone and Fiore suggested that the statute meant anything other than what it expressly says.[6]

Amicus NACDL does not here argue that the above canons of statutory construction are necessarily constitutionally required. However, the constitutional principle at issue here is sufficiency of the evidence: Fiore must be granted a writ of habeas corpus because the Commonwealth did not prove every element of the crime charged (properly construed) beyond a reasonable doubt. To determine those elements and their meaning, this Court must look to Pennsylvania's highest court, which has authoritatively construed section 401 of the SWMA to require proof that the defendant did not possess a permit. Under Pennsylvania law, the construction articulated in *Scarpone* was an explication of the elements always required by the statute. To convict, they should have been proven in Fiore's prosecution. To affirm the district court's grant of the writ,

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[6] The contrary construction given the statute by the Superior Court of Pennsylvania in Fiore's case, which conflicted with the intermediate Commonwealth Court in Scarpone's case, is not binding on this or other federal courts. Where a state's highest court has not spoken on an issue, the decisions of intermediate state courts may be considered when ascertaining state law, but are not controlling. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). In the absence of authoritative interpretation by the state high court, the federal court has "no choice but to engage in its own construction of the statute." *Vachon*, 414 U.S. at 484 (Rehnquist, J., dissenting).

this Court need only recognize, according to settled principles, an authoritative construction of a state statute.

B. Because the Pennsylvania Supreme Court in *Scarpone* Merely Recognized the Clear Meaning of the SWMA, It Did Not Make "New Law" and There Is No Retroactivity Issue in this Case.

Even if this Court were to reject the proposition that the *Scarpone* decision was an explication what section 401 of the SWMA always meant, that decision was not "new law" triggering a retroactivity analysis and prohibiting a federal court's reference to it in reviewing Fiore's due process claim. Whether formulated as an issue of retroactive application of a state court's reading of a statute or as one governed by *Teague v. Lane*, 489 U.S. 288 (1989),[7] no retroactivity issue is presented where, as here, there simply has been no change in the law. The United States Court of Appeals for the Third Circuit thus erred when it concluded that Fiore was entitled to habeas corpus relief only if the *Scarpone* decision were applied "retroactively."

The question of retroactivity is "whether the court should apply the new rule or the old one." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-35 (1991) (plurality opinion). A fortiori, there must *be* an "old" rule and a "new" one. "It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct." *Id.* at 534. In the context of retroactivity doctrine, a rule is not new unless the issue was novel, innovative principles were necessary to resolve it, or the issue had been previously settled in a contrary manner.

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[7] The plurality decision in *Teague* became authoritative when it was adopted by the majority in *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1968).

Contrary to the Third Circuit's holding below, the Pennsylvania Supreme Court's ruling in *Scarpone* cannot be considered "new law" under the foregoing principles. First, there was no prior "old" rule, upon which the state had relied to its detriment. As discussed above, the plain language of the statute states that lack of a permit is an essential element of a section 401 violation, and the *Scarpone* decision so held. Second, Pennsylvania statutory and common law require application of a rule of strict construction to criminal provisions: "[P]enal statutes must be strictly construed, with ambiguities being resolved in favor of the accused." *Commonwealth v. Lassiter*, 722 A.2d 657, 660 (Pa. 1998); 1 PA. CONS. STAT. § 1928(b)(1) (1975);[8] *see also Commonwealth v. Todd*, 384 A.2d 1215, 1217 (Pa. 1978) (under a statute which defines "firearm" with reference to a weapon's length, gun length is an essential element of the crime because penal statutes must be strictly construed). Because the plain statutory language and Pennsylvania rules of construction dictated the outcome in *Scarpone*, and no contrary controlling authority existed, it cannot be considered "new law." Indeed, the Pennsylvania Supreme Court

[8] Pennsylvania has codified its rules of statutory construction, one of which provides: "*All* provisions of a statute in the classes hereafter enumerated shall be strictly construed: (1) Penal provisions." 1 PA. CONS. STAT. § 1928(b)(1) (emphasis added). Thus, while the Pennsylvania Crimes Code contains a construction principle that "the provisions of this title shall be construed according to the fair import of their terms," 18 PA. CONS. STAT. § 105 (1995), the Pennsylvania Supreme Court has read the rule of strict construction to trump: "All statutes are to be read so as to accord fair import of their terms, and in so reading them, certain statutes, namely penal statutes, are to be strictly construed," *Commonwealth v. Besch*, 674 A.2d 655, 660 n.7 (Pa. 1996). Although the SWMA contains a clause that the statute should be liberally construed to best effectuate the statute's goals, SWMA § 901, PA. STAT. ANN. tit. 35, § 6018.901, this must be read in light of the foregoing to apply only to the civil provisions of the statute.

emphasized that the reading of section 401 applied by the trial court in Fiore and Scarpone's case (the construction approved by the court that affirmed Fiore's conviction) was nothing more than a "bald fiction." (J.A. 121.) Retroactivity analysis is thus inapplicable. Third, any other decision in *Scarpone* would have raised serious concerns about whether he had been given constitutionally adequate notice that his conduct was punishable as a felony. The Constitution requires that a criminal statute fairly express what conduct it prohibits, and likewise bars courts from retroactively expanding the statute to cover conduct that "neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). The Pennsylvania Supreme Court in *Scarpone* refused to countenance felony punishment for conduct expressly prohibited (with a misdemeanor penalty) under section 302. (J.A. 121-22.) Because of due process notice principles, the *Scarpone* decision was "compelled by existing precedent" and cannot be deemed new law subject to retroactivity analysis.[9]

The rule articulated in *Teague v. Lane* is inapplicable to this case not only because there was no "new" rule but also because, as this Court determined last Term in *Bousley v.*

[9] Likewise, *Teague* analysis is required only upon pronouncement of a new rule. Under *Teague*, "a decision announces a new rule if the result was *not* dictated by precedent existing at the time the defendant's conviction became final." *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) (emphasis added, internal quotation omitted). As discussed above, the result reached in *Scarpone* was dictated by Pennsylvania's rules of statutory construction and settled notions of due process, which unquestionably existed when Fiore's conviction became final – the unpublished decision of the superior court on direct appeal to the contrary notwithstanding. Fiore's conviction "became final" on June 11, 1990, when his right to petition this Court for certiorari expired, after the state Supreme Court refused to hear his direct appeal. *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (per curiam); *see Commonwealth v. Fiore*, 575 A.2d 109 (Pa. 1990) (allowance of appeal denied March 13, 1990); SUP. CT. R. 13.1 (ninety days to petition for certiorari).

United States, *Teague* analysis only applies to rules of constitutional criminal procedure. In *Bousley*, this Court reasoned that:

> The only constitutional claim made ... is that petitioner's guilty plea was not knowing and intelligent. There is really nothing new about this principle, enumerated as long ago as *Smith v. O'Grady*, [312 U.S. 329, 334 (1941)]. And because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.

523 U.S. at —, 118 S. Ct. at 1610.[10] Likewise, the only constitutional claim Fiore has raised throughout this litigation is the right articulated long ago in *Jackson v. Virginia*, to be convicted only upon proof beyond a reasonable doubt of every element of the crime charged. The "rule" in *Scarpone* was not "new," was not "constitutional" and was not one of "procedure."[11] For all these reasons, *Teague* does not apply.

C. The Autonomy of the Commonwealth of Pennsylvania Would Not Be Infringed by this Court's Reliance on the *Scarpone* Decision in Ruling on Fiore's Habeas Corpus Petition.

The general statement that "the federal constitution has no voice on the subject of retroactivity," relied upon by the court below in denying Fiore a writ of habeas corpus, was misapplied to

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[10] The United States Court of Appeals for the Third Circuit thus misconstrued the relevance of *Bousley* to this case. (Pet. for Writ of Cert., App. A.) *Bousley* does not mandate retroactive application of *Scarpone*, but rather confirms that *Teague* analysis applies only to new rules of constitutional criminal procedure.

[11] Indeed, this point was conceded by the Commonwealth in its brief to the Third Circuit Court of Appeals: "The Pennsylvania Supreme Court decision in *Scarpone* does not announce a new rule of criminal procedure . . . ." and is properly characterized as a decision regarding "statutory construction." (J.A. 272-73.)

this case. (Pet. for Writ of Cert., App. A (internal quotation omitted).) The question presented by Fiore's petition is not whether federal constitutional law requires Pennsylvania state courts to apply the *Scarpone* decision retroactively, but whether a federal habeas court must ignore the *Scarpone* decision in determining the elements of section 401 as applied to Fiore's case. No case cited by the Third Circuit compelled its reversal of the district court, which granted relief, because the cases relied on by the Third Circuit only address the issue of whether federal constitutional law requires a *state* to apply its law in a certain way. *See, e.g., Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973) (per curiam) (Federal Constitution does not dictate whether Florida courts must apply a Florida Supreme Court decision striking down statute prospectively or retrospectively, so long as defendants convicted under the statute had constitutionally proper notice that their acts were criminal when committed);[12] *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932) (Federal Constitution says nothing about a *state's* choice of whether to apply a ruling prospectively or retroactively to civil litigants).

Ironically, if the Commonwealth and the Third Circuit are correct, Fiore would be placed in a *worse* position after

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[12] Indeed, *Wainwright v. Stone* supports the result Fiore seeks here. There, the defendants were convicted under Florida's sodomy statute. *Id.* at 21. They sought habeas relief claiming that the statute was unconstitutionally vague and that the Florida Supreme Court had, after their convictions were affirmed, so held. *Id.* at 22-23. This Court denied habeas relief because, at the time the defendants engaged in the offense, Florida case law clearly indicated that their conduct was prohibited. *Id.* at 23. This Court declined to apply retroactively the Florida decision striking down the sodomy statute because the Florida Supreme Court had indicated that the decision would operate prospectively only. *Id.* Moreover, as this Court emphasized, no due process notice concerns were presented because the defendants "were on clear notice that their conduct was criminal under the statute as then construed." *Id.* at 23-24. Unlike the instant case, then, *Wainwright v. Stone* involved a clear change in state case law. In contrast to the defendants in *Wainwright v. Stone*, Fiore had no notice that his conduct was criminal under section 401 when he engaged in it. *See* Part II *infra*.

the Pennsylvania Supreme Court decided *Scarpone* than he would be placed in had *Scarpone* never been decided. Absent the *Scarpone* decision, a federal habeas court would be required to predict how the Supreme Court of Pennsylvania would resolve both the statutory interpretation and constitutional due process issues of Fiore's conviction for disposing of waste without a permit when he in fact had one. *See Vachon*, 414 U.S. at 484 (Rehnquist, J., dissenting); *Estate of Bosch*, 387 U.S. at 465; *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153, 160-61 (1948). Given the plain language of the statute, Pennsylvania's own rule of strict construction, and due process notice concerns, surely a federal court faced with Fiore's case as a matter of first impression would predict the outcome the Pennsylvania Supreme Court reached in *Scarpone*.

For all these reasons, as well as those presented in petitioner's brief, the judgment of the United States Court of Appeals for the Third Circuit must be reversed.

II. AS A MATTER OF CONSTITUTIONAL DUE PROCESS, THIS COURT IS REQUIRED TO CONSTRUE SECTION 401 OF THE SWMA NARROWLY, AS IT WAS CONSTRUED IN *SCARPONE*, TO PREVENT RETROACTIVE JUDICIAL EXPANSION OF THE SCOPE OF THE STATUTE.

Rejection of one legal rule is always, by implication, adoption of another. If in deciding Fiore's *Jackson v. Virginia* claim this Court were to reject application of the interpretation of section 401 reached in *Scarpone*, it would be adopting a reading of the statute fraught with due process difficulties.[13] The question presented by

[13] The Court would also be following an interpretation of the SWMA adopted by one Pennsylvania state trial court, and non-precedentially by an intermediate appellate court, but rejected by two Pennsylvania higher courts. In reviewing Fiore's direct appeal, the Superior Court of Pennsylvania did not discuss Fiore's sufficiency of the evidence argument but rather "affirm[ed] on the basis of the opinion of the court below." (J.A. 99-100.) Fiore's request for allowance of appeal to the Supreme Court of

(continued . . .)

Fiore's habeas petition is not whether reference to the *Scarpone* decision would require impermissible retroactive application of that decision, but whether any interpretation of section 401 other than the one reached in *Scarpone* would be constitutionally permissible, as applied to Fiore. *Amicus* urges that it would not. Settled principles of due process mandate that a federal court, reviewing Fiore's claim, construe section 401 in a manner that preserves his right to notice that his conduct could be considered a felony violation of law.[14] Adoption of the trial court's reading of section 401 would violate the Due Process Clause as an impermissible judicial broadening of the felony provisions of the SWMA to apply to Fiore's conduct. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). In this respect, the Due Process Clause places a control on judicial action that is equivalent to the restriction placed on the Legislature by the Ex Post Facto

(. . . continued)

Pennsylvania was denied in an unpublished order in March 1990. *Commonwealth v. Fiore*, 575 A.2d 109 (Pa. 1990). Thus the trial court is the *only* court to have discussed in any depth the theory of the SWMA supporting Fiore's conviction. Both the Pennsylvania Commonwealth Court and Supreme Court, in co-defendant Scarpone's case, rejected the analysis applied by the trial court and adopted by the Superior Court panel in Fiore's case. (J.A. 110-11; 122.)

[14] The fact that the petitioner had notice that his conduct was punishable as a misdemeanor under another statute does not deny him the right to due process and proper notice of the full consequences of his actions. In *Bouie v. City of Columbia*, this Court observed that it was "irrelevant" that the petitioners might have intended to be arrested, as the "determination whether a criminal statute provides fair warning" must be made objectively, "rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants." 378 U.S. 347, 355 n.5 (1964). Moreover, this Court has repeatedly held that the Ex Post Facto Clause, upon which the due process concerns in this case are based, "forbids the application of any new punitive measure to a crime already consummated." *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *accord California Dep't of Corrections v. Morales*, 514 U.S. 499, 504-05 (1995); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). That Fiore may have been on notice of misdemeanor punishment does not forfeit his right to notice of possible felony punishment for identical conduct.

Clause. *Marks v. United States*, 430 U.S. 188, 192 (1977) (citing *Bouie*, 378 U.S. at 353-54).

Federal courts are the final arbiters of whether, in general or as applied, a state criminal law violates due process. *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Brown v. Ohio*, 432 U.S. 101, 169 (1977). This Court has long recognized that every citizen is protected by the essential right of "fair warning" before being accused - let alone convicted - of criminal conduct. *United States v. Lanier*, 520 U.S. 259, 266-67 (1997). Central to this protection is the concept that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* at 266. To ensure that a person is not subject to the arbitrary imposition of criminal penalties, federal courts ask essentially one question: "[W]hether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267. In the instant case, that question must resoundingly be answered in the negative.

In *Bouie v. City of Columbia*, sit-in demonstrators were convicted of trespass under a city ordinance that defined the prohibited conduct as "entry on lands of another . . . after notice from the owner or tenant prohibiting such entry." 378 U.S. at 350 n.1 (internal quotation omitted). No evidence was presented that the defendants had been given notice that they were prohibited from entering the premises where they were arrested. Their convictions, nevertheless, were affirmed by the South Carolina Supreme Court on the theory that the city trespass ordinance "cover[ed] not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Id.* at 350. The Court reversed the convictions, holding that the judicial expansion of the statute violated due process. By doing so, this Court recognized that:

> [A] deprivation of the right of fair warning can result not only from vague statutory language but

> also from an unforeseeable and retroactive judicial expansion of *narrow and precise statutory language*. . . . [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the constitution forbids.

Id. at 352-53 (emphasis added).[15]

Exactly the same situation was presented here by the superior court's action. Fiore's conviction was affirmed only because the trial court enlarged section 401 of the SWMA, at the prosecutor's request, to cover conduct not prohibited by the language (or any prior construction) of the statute. Indeed, the reasoning of *Bouie* is especially relevant to Fiore's claim, as misdemeanor penalties were available to deter and punish the precise conduct in which Fiore engaged. *Compare* SWMA §§ 401, 606(f), PA. STAT. ANN. tit. 35, §§ 6018.401, 6018.606(f) (West 1993) (defining felony penalties for disposing of waste without a permit), *with id.* §§ 302, 606(b), PA. STAT. ANN. tit. 35, §§ 6018.302, 6018.606(b) (defining misdemeanor penalties for disposing of waste in violation of

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[15] *See Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam) ("[A] State may not criminally punish the exhibition at a drive-in theater of a motion picture where the statute, used to support the conviction, has not given fair notice that the location of the exhibition was a vital element of the offense."); *see also Marks*, 430 U.S. at 188. In *Marks*, the defendants had transported obscene materials during the time that controlling Supreme Court precedent stated that the First Amendment protected expressive material unless it was "utterly without redeeming value." *Id.* at 191 (internal quotation omitted). Prior to their trial, the Court decided *Miller v. California*, 413 U.S. 15 (1973), under which "the comparable test is 'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'" *Id.* (quoting *Miller*, 413 U.S. at 24). At trial, the jury was instructed with the *Miller* standards. *Id.* at 191. Noting that certain conduct permissible under the earlier standard would be prohibited under *Miller*, the Court granted the defendants a new trial because the Due Process Clause precluded them from being punished for conduct that was not criminal when they engaged in it. *Id.* at 196.

the conditions of a permit). No fair and objective reading of the statute warned Fiore that section 401 could be applied to his conduct by an expansive, non-literal reading of the statute endorsed by the lower Pennsylvania courts.[16]

When Fiore filed his habeas petition claiming a violation of *Jackson v. Virginia*, he asked a federal court to determine whether sufficient evidence existed to sustain his conviction. In making this determination, the federal court cannot rely on an unconstitutionally broad reading of the elements of the crime charged. To do otherwise would violate petitioner's rights anew and would punish conduct the state has not constitutionally made criminal, a principle this Court has rejected. *See Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91-92 (1965).[17] There has been no determination that the

---

[16] Vagueness concerns are particularly acute in this case because the Pennsylvania legislature has defined the felony of which Fiore was convicted to be an absolute liability offense that does not require proof of mens rea. *Id.* § 606(i), PA. STAT. ANN. tit. 35, § 6018.606(i); *see Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (statute's vagueness aggravated by lack of mens rea); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952) (mens rea requirement reduces vagueness concerns).

[17] In *Shuttlesworth*, this Court considered the appeal of a defendant who was of loitering under the Birmingham General City Code. The Court determined that the language of Birmingham's loitering statute was unconstitutionally vague and overbroad, *id.* at 90, but recognized that the Alabama Court of Appeals had narrowed the statute in a manner that comported with due process, *id.* at 91. Shuttlesworth, however, had been convicted of loitering prior the Alabama court's authoritative construction of the statute. *Id.* at 92. His conviction, therefore was invalid:

> For all that appears, [the trial] court may have found petitioner guilty only by applying the literal – and unconstitutional – terms of the ordinance. . . . Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction under [the statute] cannot stand.

Id. This Court need not speculate about the trial court's application of Pennsylvania's SWMA to Fiore's conduct, because the court upheld Fiore's conviction on the basis that his actions "represented such a

Continued . . .

trial court's interpretation of section 401 of the SWMA in Fiore's case was unconstitutionally overbroad, and *amicus* does not ask this Court to make such a finding. In considering what elements the Commonwealth had to prove at trial, however, this Court should not rely on a reading of a statute that is constitutionally suspect. The lower federal courts erred in viewing the question of how to define the elements of section 401 in habeas analysis as one of "retroactivity" of the *Scarpone* decision. In applying the *Jackson v. Virginia* standard to Fiore's case, a federal habeas court may neither announce nor adopt a reading of section 401 that violates due process. The Supreme Court of Pennsylvania avoided the due process issue in *Scarpone* by reading the statute narrowly; the Court here must read the statute in the same way.

On a fair and constitutional reading of the statute of conviction, the judgment of the court below must be reversed.

(. . . continued)

significant departure from the terms of the existing permit that the operation of the waste facility was 'un-permitted.'" (J.A. 44.)

CONCLUSION

For the foregoing reasons, NACDL urges this Court to correct the constitutional error in the decision below. The Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case with directions to grant Fiore an unconditional writ of habeas corpus.

Respectfully submitted,

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May 13, 1999

Supreme Court, U.S.
FILED
JUN 25 1999
CLERK

(7)

No. 98-942

In the

Supreme Court of the United States

WILLIAM FIORE,

Petitioner,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, NEBRASKA, NEVADA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, VIRGINIA AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

In the 70 years since being confronted with the question, this Court has not wavered from its holding that the Constitution does not require the retroactive application of state court decisions construing state law. In reliance on this longstanding precedent, the States have adopted various approaches to addressing the retroactive application of judicial decisions. The amici States submit this brief because they have an abiding interest in maintaining flexibility in this area and avoiding a federal "one size fits all" retroactivity rule.

The States' interest is more than an abstract desire to continue serving as "laboratories of democracy." Retroactivity rules have a direct impact on the administration of justice. The States have looked to a variety of factors in determining the extent to which state court decisions should be applied retroactively, not the least of which is the interest in the finality of criminal convictions. The adverse impact of a rule that would call into question numerous convictions previously thought to be final speaks for itself. It is true that, based on federal separation of powers considerations, this Court has held that its decisions interpreting the elements of a federal criminal offense must be applied retroactively even to persons finally convicted. But each State should be entitled to determine for itself the powers of its own judiciary and the manner by which its own legislation is interpreted.[1]

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[1] This brief does not address any of the other issues presented by this case.

SUMMARY OF ARGUMENT

A. To evaluate a claim that the State did not prove every element of a criminal offense beyond a reasonable doubt, one must first establish the elements of the crime. In this case, that means determining, under Pennsylvania law, the elements of the statutory offense of operating a hazardous waste facility without a permit. All the Pennsylvania courts that heard or reviewed Fiore's case, prior to his conviction becoming final, concluded that the relevant statute can apply to permit holders who significantly depart from the terms of their permit. Pursuant to that construction of the statute, the prosecution met its burden of proof and complied with *In re Winship*, 397 U.S. 358 (1970), at Fiore's trial. More than a year after Fiore's conviction became final, the Commonwealth Court of Pennsylvania and the Pennsylvania Supreme Court – addressing the appeal of Fiore's co-defendant – held that the possession of a permit is an absolute defense to the charge. On collateral review, the Pennsylvania courts refused to apply that decision retroactively to Fiore's final conviction. Only if that refusal was erroneous, and Fiore was constitutionally entitled to benefit from the result of his co-defendant's appeal, does he have a claim that the evidence was insufficient to convict him beyond a reasonable doubt.

B. This Court has long held that the Constitution does not require the retroactive application of changes in state law. To the contrary, the Court has allowed the states to look to their own jurisprudential philosophies and structures in defining the effects of new judicial decisions. *Bousley v. United States*, 523 U.S. 614 (1998), did nothing to change this. In *Bousley*, this Court held that its decisions interpreting the elements of federal criminal offenses must be applied retroactively even to final

convictions. That decision, however, was based upon federal separation of powers principles, not on a constitutional provision applicable to the States. Moreover, the longstanding rule that the Constitution permits the States to develop their own retroactivity rules regarding changes in state law has never distinguished between judicial law and statutory law. Although it may seem unfair that Fiore remains in prison pursuant to a now-rejected interpretation of a criminal statute, when retroactivity is an issue, any result other than complete retrospective application will always seem unfair to those individuals left unable to benefit from the new decision. This Court's decisions make plain that such alleged unfairness is not necessarily unconstitutional.

C. The States have utilized their freedom of action in this area to devise varying retroactivity rules based on their own views of competing considerations. No standardized rule, even if narrowly tailored to apply only to changes in statutory interpretation, could take into account this diversity of policy and interests. This Court's criminal procedure decisions, although not directly on point, demonstrate that a variety of legitimate factors can be considered when developing rules of retroactivity. In particular, one extremely important factor that States consider in their retroactivity analysis is their interest in the finality of criminal convictions. A mandatory federal rule requiring States to retroactively apply all changes in state law resulting from new statutory interpretations could have a broad and adverse impact on that interest. Moreover, some States may reasonably conclude that they do not want their courts to be swayed by concerns about finality when attempting to discern the most appropriate interpretation of a criminal statute.

ARGUMENT

I. THE FEDERAL CONSTITUTION DOES NOT REQUIRE THE RETROACTIVE APPLICATION OF THE PENNSYLVANIA SUPREME COURT'S *SCARPONE* DECISION TO FINAL CONVICTIONS

A. Fiore's Conviction Violates *Winship* Only if the *Scarpone* Decision Applies Retroactively to Final Convictions

Initially, the amici States do not dispute that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Nor is it disputed that an allegation of insufficient evidence presents a constitutional claim cognizable in a federal habeas corpus proceeding. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979). In evaluating such a claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. It necessarily follows that, in order to evaluate the sufficiency of the evidence, a court must first establish the essential elements of the crime under review. Therefore, with respect to the instant case, the question becomes what were the elements of the relevant crime, under Pennsylvania law, at the time of Fiore's conviction and subsequent appeal.

Among other crimes, Fiore and his co-defendant Dave Scarpone were charged with operating a hazardous waste

facility without a permit in violation of 35 Pa. Cons. Stat. § 6018.401(a) (1993). Although Fiore had obtained a permit, Pennsylvania asserted that the charge was proper because Fiore "so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation." Pet. App. 3. The trial court agreed with the prosecution's construction of the statute and Fiore was convicted. On appeal, Fiore asserted that the evidence was insufficient to convict him of operating an unpermitted facility because he possessed a permit. The Pennsylvania Superior Court rejected Fiore's claim and adopted the reasoning of the trial court. Specifically, that court held that Fiore's actions "represented such a significant departure from the terms of the existing permit that the operation of the hazardous waste facility was 'unpermitted.'" Pet. App. 4. The Pennsylvania Supreme Court subsequently denied Fiore's petition for allowance to appeal. There is no present dispute that substantial evidence shows that Fiore significantly departed from the terms of his permit. Accordingly, pursuant to the construction of the statute under which he was convicted and by which his convictions were affirmed on appeal, Fiore's trial complied with both *Winship* and *Jackson*.

More than a year after Fiore's convictions became final, the Commonwealth Court of Pennsylvania – addressing the appeal of Fiore's co-defendant – construed §6018.401(a) so as to make possession of a permit an absolute defense. On that basis, the court reversed the co-defendant's conviction, *Scarpone v. Commonwealth*, 596 A.2d 892, 895 (Pa. Commw. Ct. 1991), and the Pennsylvania Supreme Court affirmed. *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). Fiore thereafter sought post-conviction relief based on the result of his co-defendant's

appeal. Applying state retroactivity law that prohibits the application of new rules to final convictions, the Superior Court of Pennsylvania declined to apply *Scarpone* to Fiore's conviction. *Commonwealth v. Fiore*, 665 A.2d 1185, 1193 (Pa. Super. Ct. 1995), *appeal denied*, 675 A.2d 1243 (Pa. 1996). Only if the Superior Court erred, and Pennsylvania was required to apply *Scarpone* retroactively, might Fiore have a claim under *Winship* and *Jackson*. If *Scarpone* does not apply retroactively, Fiore stands properly convicted under the law as it existed at the time his conviction became final.

B. The Federal Constitution is Silent Regarding the Retroactivity of State Court Decisions Construing State Law

1. Historically, there were two basic schools of thought regarding retroactive application of changes in the law. *Linkletter v. Walker*, 381 U.S. 618, 622 (1965). One, which ruled the English common law, was that all judicial decisions were retrospective in nature. The roots of this view can be found in Blackstone's *Commentaries* in which "Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Id.* at 622-23 (quoting Blackstone, *Commentaries* 69 (15th ed. 1809)). The underlying principle of the Blackstone philosophy was that judges do not create law, but merely discover it. *Id.* at 623 (citing Gray, *Nature and Sources of the Law* 222 (1st ed. 1909)). A contrary approach, proffered by Austin, "maintained that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite or generic statutory or common-law terms that alone are but the empty crevices of the law." *Id.* at 624. Under the Austin view, "rather than being

erased by the later overruling decision[, the prior law] is considered as an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed." *Id.* As noted by this Court, the more pragmatic approach of Austin began to gain acceptance around the middle of the 19th Century. *Id.*

Although this Court's retroactivity jurisprudence has been an evolving and complex area of the law, *see, e.g., Teague v. Lane*, 489 U.S. 288 (1988); *Griffith v. Kentucky*, 479 U.S. 314 (1987); *United States v. Johnson*, 457 U.S. 537 (1982); *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter*, 381 U.S. 618, one aspect has not changed: "the Federal Constitution has no voice" regarding the retroactive application of state court decisions construing state law. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932); *see also Wainwright v. Stone*, 414 U.S. 21 (1973). Put another way, the Constitution allows the States, when construing state law, to decide for themselves whether to adopt the Blackstone or Austin approach. "'A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.'" *Wainwright*, 414 U.S. at 24 (*quoting Sunburst Oil*, 287 U.S. at 364). This choice "may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Sunburst Oil*, 287 U.S. at 365.

2. Contrary to Fiore's suggestion, nothing in this Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), injects a constitutional component to his claim. *Bousley* followed the decision reached in *Bailey v. United States*, 516 U.S. 137 (1995), which held that a conviction for "use" of a firearm under 18 U.S.C. § 924(c)(1) requires the Government

to show "active employment of the firearm" and not mere possession. Bousley, who had pleaded guilty to violating § 924(c)(1) prior to the *Bailey* decision, sought habeas corpus relief on the ground that his guilty plea had been based upon an erroneous interpretation of the statute. *Bousley*, 523 U.S. at 618. This Court allowed for retroactive application, holding that "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid." *Id.* at 621.

That decision, however, was not based upon a constitutional provision applicable to the States. Rather, it was deemed required because "under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley*, 523 U.S. at 620-21. This premise, grounded in federal law, was the basis for the Court's finding that a contrary decision would "'necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.* (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). As the Third Circuit correctly pointed out below, "[b]ecause the *Bousley* decision rested on [this Court's] understanding of the balance of power in the federal system, it differs critically from the current case, which involves a state court's refusal to give retroactive effect to a judicial interpretation of a state statute." Pet. App. 12 n.4. Whether a state court's judicial interpretation of a state statute violates the separation of powers structure in that state is plainly a question of state law. As related to this case, it is a question apparently never raised by Fiore in state court. Throughout the attacks on his conviction, it does not appear that Fiore ever alleged that the refusal of the Pennsylvania courts to retroactively apply the

Scarpone decision violated Pennsylvania's separation of powers doctrine.

Moreover, the longstanding rule that the silence of the Constitution permits States to develop their own retroactivity rules regarding changes in state law does not make a distinction between changes in common law and statutory law. In originally holding that "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward," this Court specifically stated that "[t]he alternative is the same whether the subject of the new decision is common law . . . or *statute*. . . ." *Sunburst Oil*, 287 U.S. at 365 (emphasis added). In fact, the retroactivity question at issue in that case concerned the judicial construction of a Montana statute. *Id.* at 359; *see also Wainwright*, 414 U.S. at 24 (Florida is not "constitutionally compelled . . . to make retroactive its new construction of [a] Florida statute").

Not surprisingly, then, the Third Circuit is not alone in affirming state court decisions that refused to apply new constructions of criminal statutes to persons whose convictions under the statutes were finally decided. For example, in *La Rue v. McCarthy*, 833 F.2d 140 (9th Cir. 1987), the defendant La Rue was convicted of second degree felony murder in violation of California Penal Code § 187, the underlying felony being child abuse. After his conviction became final, the California Supreme Court held in subsequent cases that § 187 is inapplicable when the underlying offense charged is any form of child abuse. *Id.* (citing *People v. Smith*, 35 Cal. 3d 798 (1984)). The California Supreme Court declined to reopen LaRue's case, and the Ninth Circuit affirmed the denial of his habeas corpus petition. The court concluded that "the refusal

by the California Supreme Court to apply the *Smith* rule retroactively might be unfair, but it is not unconstitutional. . . . The retroactivity of a state change of law is a state question and the federal Constitution has no voice upon the subject." *Id.* at 142 (citations omitted).

Likewise, in *Shields v. Wainwright*, 813 F.2d 1123 (11th Cir. 1987) (*per curiam*), the Eleventh Circuit addressed a habeas corpus petition filed by Shields, who had been convicted of kidnapping pursuant to a Florida statute. Subsequent to Shield's conviction, the Florida Supreme Court interpreted the statute for the first time, substantially narrowing the conduct previously thought to be encompassed by it. *Id.* at 1123 (citing *Carron v. State*, 427 So. 2d 192, 193 (Fla. 1983)). The Eleventh Circuit rejected Shields' claim that "his conviction should be vacated because his conduct during the course of the robbery did not constitute kidnapping under the Florida statute as it is now interpreted." 813 F.2d at 1123. The court deemed it irrelevant whether Shields' conduct would constitute a crime under the new interpretation of the statute because "the proper test is whether the evidence was sufficient for conviction according to the law as interpreted at the time of the conviction. Here the evidence was quite ample to prove each element of the crime of kidnapping as the statute defined the crime." *Id.* at 1124.

3. It may be that the rule established in *Bousley* seems fairer than one that would have Fiore remain in prison based upon a now-rejected construction of a statute. When retroactivity is the issue, however, anything short of pure and complete retroactive application will always seem unfair to the individual who does not get the benefit of the latter decision. It is an inherent part of the doctrine. But this Court's decisions make

plain that what may seem unfair is not necessarily unconstitutional. Each time this Court has declined to give a change in the law complete retroactive effect, someone has been there to point to the "unfair" impact on those left unable to take advantage of the new rule. *See, e.g., Linkletter*, 381 U.S. at 640-645 (Black, J., dissenting) ("Despite the Court's resounding promises throughout the *Mapp* [*v. Ohio*, 376 U.S. 643 (1961),] opinion that convictions based on such 'unconstitutional evidence' would 'find no sanction in the judgments of the courts,' Linkletter, convicted in the state court by use of 'unconstitutional evidence,' is today denied relief by the judgment of this Court because his conviction became 'final' before *Mapp* was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free."); *Solem v. Stumes*, 456 U.S. 638, 655 (1984) (Stevens, J., dissenting) ("because the unlawful interrogation took place prior to May 18, 1981, the date *Edwards* [*v. Arizona*, 451 U.S. 477 (1981),] was decided, the Court holds that respondent's statements are admissible in evidence even though they would have been inadmissible if they had been made after May 18, 1981").

Even this Court's current approach, allowing for retroactive application of new rules to cases pending at the time of the decision, but not to those finally decided, does not absolve the system of all ostensible inequities. Those individuals who remain incarcerated on the basis of *Teague* no doubt feel it is unfair to deny them the benefit of a new rule which, if applied to their case, would require their release from prison or, at the very least, a new trial. The relevant decisions plainly demonstrate that avoidance of all seemingly inequitable results is not the sole goal and guiding force when resolving retroactivity concerns. While Pennsylvania's refusal to apply

Scarpone retroactively to cases on collateral review may seem unfair to Fiore, it does not elevate his claim to one of constitutional dimension.[2]

C. The States Should Retain the Option to Decide Whether to Apply New Constructions of State Criminal Statutes Retroactively

1. The States have utilized their freedom of action in this area to devise different retroactivity rules based on varying views as to, among other considerations, the importance of finality, the equities involved, the nature of the statutes, and separation of powers principles. This can be seen in the few reported decisions addressing the retroactive reach of new judicial constructions of criminal statutes. A number of states, concluding that the interest in finality outweighs the other considerations, have adopted the rule that new judicial constructions of criminal statutes do not apply retroactively to final convictions. For example, in *People v. Hill*, 648 N.E.2d 455 (1995), the New York Court of Appeals considered whether to retroactively apply its decision in *People v. Ryan*, 626 N.E.2d 51 (N.Y. 1993), which construed a possession of a controlled substance statute for the first time. In *Ryan*, the court held that the state must prove beyond a reasonable doubt

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[2] Amici acknowledge that the facts of this case are unusual in that the same criminal offense is being construed differently with respect to two individuals who were tried together and convicted of the same crime based upon the same evidence. This Court, however, declined to grant certiorari with respect to Fiore's equal protection claim. Should this Court nevertheless determine that, in light of these circumstances, Fiore's continued incarceration violates due process, the amici States would respectfully request that any such holding be restricted to the unique situation presented.

that the defendant had knowledge of both the possession of the substance and its weight. *Hill*, 648 N.E.2d at 456. Hill, who was convicted of the offense prior to the *Ryan* decision, argued on appeal that the evidence "failed to establish that he knew or had reason to know the contraband weighed at least one-half ounce" and that "the trial court erred by refusing to instruct the jurors that the People were required to prove his knowledge of the weight of the contraband." *Id.* at 457. The New York Court of Appeals concluded that the new rule must apply retroactively only to cases pending on the date of the new construction. *Id.* at 458.

In *Kerns v. Grammar*, 416 N.W.2d 253 (Neb. 1987), the Nebraska Supreme Court considered whether a change in its interpretation of Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221, should be applied retroactively. At the time of Kerns' conviction, the Nebraska Supreme Court had "held that two prior offenses which were committed on the same date, prosecuted in the same information, and resulted in concurrent sentences could be treated as two separate convictions for the purposes of enhancing a sentence under § 29-2221." *Id.* at 255 (citation omitted). A year later, however, in *State v. Ellis*, 333 N.W.2d 391 (Neb. 1983), the court reinterpreted § 29-2221 by holding that "in order to warrant the enhancement of the penalty under . . . § 29-2221, the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense." *Kerns*, 416 N.W.2d at 256. After applying the considerations set forth in *Linkletter*, the Nebraska Supreme Court concluded that "the *Ellis* rule is not to be applied retroactively and is not to be applied to Kerns." *Id.* at 256.

Several States have reached a contrary result, requiring retroactive application of judicial constructions of criminal statutes even to final convictions. For example, in *State v. Howard*, 564 N.W.2d 753 (Wis. 1997), the Wisconsin Supreme Court considered a statute similar to the one at issue in *Bousley* and reached a result similar to that of this Court. In 1989, Howard was convicted of several drug-related offenses along with possessing a dangerous weapon, a penalty-enhancing violation. *Id.* at 756. In 1994, the Wisconsin Supreme Court required for the first time that, when a defendant is charged with that penalty enhancer, the statute requires the State to prove a nexus between the underlying crime and possession of the weapon. *Id.* at 757 (citing *State v. Peete*, 517 N.W.2d 149 (1994)). Howard sought post-conviction collateral relief on the basis that, at his trial, the jury did not receive an instruction on the nexus element. *Howard*, 564 N.W.2d at 757. The Wisconsin Supreme Court held that its decision in *Peete* would be applied retroactively. *See also Hickson v. State*, 640 P.2d 921 (Nev. 1982) ("Thus, retroactivity . . . is not at issue here. We must simply determine whether the acts for which Hickson was convicted were proscribed by the statute as originally defined by the legislature.") (citation omitted).

2. It does not matter, of course, which of the States have better weighed the competing considerations. What is important is that the States retain the freedom to make the decision for themselves. When a change in the law requires that a retroactivity determination be made, this freedom enables the States to evaluate the issue by taking into account different factors and the application of those factors to the specific case under review. No standardized rule, even if narrowly tailored to apply only to changes in the substantive interpretation of

statutes, could take into account all of the ways in which it would impact the 50 States.

The need to avoid a standardized rule in this area of the law is demonstrated by even a cursory review of this Court's struggles with, and decisions regarding, the retroactive application of its decisions altering criminal law. Although most of this Court's criminal retroactivity cases have addressed rules of procedure, not statutory interpretations, they make clear that a "one size fits all" approach to retroactivity is ill-advised. Instead, these cases make plain that retroactivity rules implicate a variety of competing interests, about whose weight reasonable people – including reasonable state legislators and jurists – could disagree. As this Court stated nearly 60 years ago, "questions [about retroactivity] are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

In *Linkletter*, the first of the modern criminal retroactivity decisions, this Court adopted a three-pronged analysis for claims of retroactivity. 381 U.S. at 636-38. Specifically considered was the purpose of the previous rule; the reliance placed upon the previous rule; and the effect on the administration of justice of a retrospective application of the previous rule. *Id.* Applying this approach, the Court held that the exclusionary rule of *Mapp* would apply only to trials commencing after the date of the decision. The Court consistently applied the *Linkletter* approach until its decision in *United States v. Johnson*, 457 U.S. 537 (1982), in which it

drew for the first time a distinction between pending cases and those finally decided.

That distinction was solidified in *Griffith v. Kentucky*, 479 U.S. 314 (1987), when the Court stated that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. Subsequently, in *Teague v. Lane*, 489 U.S. 288 (1988), this Court adopted a more definitive standard with respect to cases finally decided. The now-familiar rule provides that, with two exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310. Although the Court's retroactivity decisions are not controlling with respect to state law, they demonstrate that a variety of legitimate factors can be considered – and results obtained – when developing and applying rules of retroactivity.

3. Of particular importance to all States is the finality of criminal convictions. This Court's decisions clearly demonstrate that whether a particular decision will have a negative impact on finality is a legitimate concern in determining if it will be given retroactive effect. For example, in holding that the exclusionary rule of *Mapp* would not be applied retroactively, this Court stated that "there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost." *Linkletter*, 381 U.S. at 637. More recently, the *Teague* rules for retroactivity in habeas corpus cases in large measure stem from deference to the interest in finality. Finality is a principle this Court has repeatedly recognized as "essential to the operation

of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309.

It is partially out of concern for finality that the amici States urge this Court not to grant Fiore relief based on a retroactive application of *Scarpone*. Admittedly, the adverse effect on finality in this particular case would not be substantial. It appears that only one finally decided conviction would be affected. A mandatory federal rule, however, requiring States to retroactively apply changes in the law resulting from statutory interpretation could potentially have an extremely broad effect. If, for example, the statutory interpretation under which Fiore was convicted had been actively enforced in Pennsylvania for twenty years, the adverse impact on finality would be much more serious.

Moreover, a rule requiring state courts to apply statutory interpretations retroactively would not do away with the concern for finality, but would simply change the point in the process when it is considered. In other words, if a court knows retroactive application of a new interpretation will be required, it might determine that the price of declaring the change will be too costly. Some States may reasonably conclude that a court should not be faced with such concerns when attempting to reach the most appropriate result. When it comes to the reach and construction of state laws, this is a choice each State should be permitted to make for itself.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be affirmed.

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June 24, 1999